

Nos. 22-55988, 56036

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

AL OTRO LADO, INC., *et al.*,
Plaintiffs-Appellees/Cross-Appellants,

v.

ALEJANDRO MAYORKAS, Secretary of Homeland Security, *et al.*
Defendants-Appellants/Cross-Appellees,

and

the EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,
Appellant/Cross-Appellee.

On Appeal from a Final Judgment Issued by the U.S. District Court for the
Southern District of California (Civil Action No. 3:17-cv-02366-BAS-KSC)

FURTHER EXCERPTS OF RECORD

BRIAN M. BOYNTON
Principal Deputy Assistant
Attorney General

WILLIAM C. PEACHEY
Director

KATHERINE J. SHINNERS
Senior Litigation Counsel

ALEXANDER J. HALASKA
Senior Litigation Counsel
U.S. Department of Justice
Civil Division
Office of Immigration Litigation -
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 307-8704 | Fax: (202) 305-7000
Email: alexander.j.halaska@usdoj.gov

Counsel for the Government

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1 MAYER BROWN LLP
 Matthew H. Marmolejo (CA Bar No. 242964)
 mmarmolejo@mayerbrown.com
 350 S. Grand Avenue
 25th Floor
 Los Angeles, CA 90071-1503
 Ori Lev (DC Bar No. 452565)
 (pro hac vice)
 olev@mayerbrown.com
 Stephen M. Medlock (VA Bar No. 78819)
 (pro hac vice)
 smedlock@mayerbrown.com
 1999 K Street, N.W.
 Washington, D.C. 20006
 Telephone: +1.202.263.3000
 Facsimile: +1.202.263.3300

9 SOUTHERN POVERTY LAW CENTER
 10 Melissa Crow (DC Bar No. 453487)
 (pro hac vice)
 melissa.crow@splcenter.org
 1101 17th Street, N.W., Suite 705
 Washington, D.C. 20036
 Telephone: +1.202.355.4471
 Facsimile: +1.404.221.5857

14 *Additional counsel listed on next page*
 15 Attorneys for Plaintiffs

16 **UNITED STATES DISTRICT COURT**
 17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 Al Otro Lado, Inc., *et al.*,

19 Plaintiffs,

20 v.

21 Chad F. Wolf,¹ *et al.*,

22 Defendants.

Case No.: 17-cv-02366-BAS-KSC

**PLAINTIFFS' REPLY IN SUPPORT
OF THEIR MOTION FOR
SUMMARY JUDGMENT**

Special Briefing Schedule Ordered (*see*
Dkt. 518)

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

25

 26 ¹ Defendants have represented that Mr. Wolf is the Acting Secretary of the U.S.
 27 Department of Homeland Security. Numerous courts disagree. *Casa de Md., Inc. v.*
 28 *Wolf*, 2020 WL 5500165, at *23 (D. Md. 2020); *Immigrant Legal Res. Ctr. v. Wolf*,
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1 CENTER FOR CONSTITUTIONAL RIGHTS

2 Baher Azmy (NY Bar No. 2860740) (*pro hac vice*)
3 *bazmy@ccrjustice.org*
4 Ghita Schwarz (NY Bar No. 3030087) (*pro hac vice*)
5 *gschwarz@ccrjustice.org*
6 Angelo Guisado (NY Bar No. 5182688) (*pro hac vice*)
7 *aguisado@ccrjustice.org*
8 666 Broadway, 7th Floor
9 New York, NY 10012
10 Telephone: +1.212.614.6464
11 Facsimile: +1.212.614.6499

12 SOUTHERN POVERTY LAW CENTER

13 Sarah Rich (GA Bar No. 281985) (*pro hac vice*)
14 *sarah.rich@splcenter.org*
15 Rebecca Cassler (MN Bar No. 0398309) (*pro hac vice*)
16 *rebecca.cassler@splcenter.org*
17 150 E. Ponce de Leon Ave., Suite 340
18 Decatur, GA 30030
19 Telephone: +1.404.521.6700
20 Facsimile: +1.404.221.5857

21 AMERICAN IMMIGRATION COUNCIL

22 Karolina Walters (DC Bar No. 1049113) (*pro hac vice*)
23 *kwalters@immcouncil.org*
24 1331 G St. N.W., Suite 200
25 Washington, D.C. 20005
26 Telephone: +1.202.507.7523
27 Facsimile: +1.202.742.5619
28

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CITATION FORM

“CBP” refers to U.S. Customs and Border Protection.

“CM” refers to Defendants’ Cross-Motion for Summary Judgment (Dkt. 563).

“CM Opp.” refers to Plaintiffs’ Opposition to Defendants’ Cross-Motion for Summary Judgment (Dkt. 585).

“CM Opp. Ex.” refers to the exhibits attached to Plaintiffs’ Opposition to Defendants’ Cross-Motion for Summary Judgment (Dkt. 585).

“DHS” refers to the U.S. Department of Homeland Security.

“Ex.” refers to the exhibits attached to the Declaration of Stephen Medlock filed concurrently with this reply brief.

“INA” refers to the Immigration and Nationality Act.

“OFO” refers to CBP’s Office of Field Operations.

“Op. Br.” refers to Plaintiffs’ Opening Brief in Support of their Motion for Summary Judgment (Dkt. 533).

“Op. Ex.” refers to the exhibits attached to Plaintiffs’ Opening Brief in Support of their Motion for Summary Judgment (Dkt. 533).

“POE” refers Class A ports of entry on the U.S.-Mexico border.

REPLY IN SUPP. OF
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1 **I. INTRODUCTION**

2 As a report issued this morning by DHS' Office of Inspector General ("OIG")
3 makes clear, Plaintiffs caught the Government red-handed. *See* Ex. 1. Unrebutted
4 evidence that OIG has now corroborated shows that when asylum seekers were in
5 the process of arriving at POEs, CBP officers lied to them. Under instructions from
6 their superiors, CBP officers told asylum seekers that POEs were "at capacity" when
7 those POEs were actually operating well below 100% capacity. Rule 30(b)(6)
8 witnesses admitted that these asylum seekers were attempting to enter the U.S.
9 Therefore, they should have been inspected and processed as the INA requires.

10 Defendants' turnback policy had the intent and effect of turning back asylum
11 seekers and denying them access to the asylum process. The Secretary of DHS
12 requested information on how many asylum seekers would be turned back at POEs
13 if a memorandum that memorializes certain aspects of the turnback policy were
14 implemented. After learning that 650 asylum seekers per day would be turned back,
15 she issued the memo. Ex. 1 at 6.

16 In addition, [REDACTED]
17 [REDACTED]
18 [REDACTED]. The reason for this

19 decision is obvious. Defendants believed that processing asylum seekers more
20 efficiently would undermine the purpose of the turnback policy by creating a "pull
21 factor" that would cause more asylum seekers to arrive at POEs. As a result, they
22 [REDACTED]
23 [REDACTED].

24 Defendants also admitted that their actions broke the law. In a flagrant
25 violation of the law, Defendants routinely turned back asylum seekers who were
26 standing on U.S. soil. And, behind closed doors, POE leadership told union officials
27 that all turnbacks broke the law. *See* Ex. 1 at 17 ("I know from what came down
28 from [CBP] HQ, we are trying to process the least amount of people.").

1 Amazingly, Defendants’ primary response—that they simply made inspecting
2 and processing asylum seekers a lower priority—*is itself a violation of law*.
3 Defendants repeatedly admitted that they were diminishing inspection and
4 processing of asylum seekers by making it a subordinate priority.

5 What is going on here is a shocking abuse of power by the Executive Branch
6 and abdication of Defendants’ statutory and international law obligations.
7 Defendants claim that they alone have the discretion to decide when to inspect and
8 process an asylum seeker, and how many asylum seekers will be inspected and
9 processed. That is not true. In the INA and Homeland Security Act, Congress gave
10 Defendants specific instructions about when and how asylum seekers were to be
11 inspected and processed and the level of priority that should be given to that mission.

12 The goal of the turnback policy is to end asylum. Defendants’ core argument
13 is that, despite clear statutory language, they alone have the discretion to end asylum
14 as we know it by standing astride the border and blocking access to the U.S. and to
15 the asylum process no matter what other missions they have and no matter what the
16 true facts are on the ground. Defendants argue that as long as POEs want to focus on
17 other missions, Defendants can process zero asylum seekers every day and this Court
18 can do nothing about it. That is not, and never has been, what the law says.

19 Plaintiffs are entitled to summary judgment on that basis alone. In this brief,
20 Plaintiffs address the remaining chaff in Defendants’ opposition brief. First, the OIG
21 report is powerful evidence that Defendants broke the law. Second, Plaintiffs explain
22 why Defendants’ cherry-picked factual recitation is wrong. Third, even if turnbacks
23 can be characterized as delay rather than denial of a mandatory duty, application of
24 the *TRAC* factors shows that delay is unreasonable. Finally, this Court can, and
25 should, enter declaratory and injunctive relief.

26 **II. THE DHS OIG REPORT ENDS THIS CASE**

27 This morning, DHS OIG issued a report that puts the lie to all of Defendants’
28 factual arguments. In the blockbuster report, OIG concludes that “while DHS

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1 leadership urged asylum seekers to present themselves at [POEs], the agency took
2 deliberate steps to limit the number of undocumented aliens who could be processed
3 each day at the Southwest Border [POEs].” Ex. 1 at 10. According to the report,
4 Defendants “stopped the routine processing of . . . asylum seekers . . . at 7 of the 24”
5 POEs. *Id.* Asylum seekers that presented themselves for inspection at those POEs
6 were told to return to Mexico and were forced to walk miles through harsh terrain to
7 place themselves on a waitlist with hundreds of others. *Id.* at 12-13. Moreover, at
8 four POEs, CBP officers regularly turned back asylum seekers that had already
9 crossed the international border and entered the U.S. *Id.* at 15. Furthermore, using
10 the *exact same methodology* as Plaintiffs’ expert, Stephanie Leutert, OIG concluded
11 that although increasing numbers of asylum seekers were waiting to be inspected
12 and processed in Mexico, POEs “were not using all available detention space.” *Id.*
13 And OIG directly observed detention cells sitting empty while POEs were
14 continuing to turn back asylum seekers. *Id.* at 17. OIG also discounted DHS’
15 operational capacity excuse, stating “our evidence . . . indicates that [CBP] used
16 these reasons regardless of the port’s actual capacity and capability.” *Id.* at 20. As
17 the OIG concludes: “The law does not set limits as to the number of asylum seekers
18 the Government can or must process. Nevertheless, the [DHS] Secretary and CBP
19 have effectively limited access for undocumented aliens wishing to claim asylum in
20 the United States, sometimes without notice to the public.” *Id.* at 19. This remarkable
21 admission ends this case. Defendants’ own Inspector General has confirmed all of
22 Plaintiffs’ substantive factual arguments are true. Summary judgment should be
23 issued in Plaintiffs’ favor.

24 **III. DEFENDANTS IGNORE FACTS THAT UNDERMINE THEIR CASE**

25 Defendants mischaracterize the record in an effort to manufacture disputed
26 facts where none exist. “[T]he mere existence of some alleged factual dispute
27 between the parties will not defeat an otherwise properly supported motion for
28 summary judgment; the requirement is that there can be no *genuine* issue of *material*

1 fact.” *Scott v. Harris*, 550 U.S. 372, 380 (2007). “Factual disputes that are irrelevant
 2 or unnecessary” do not count. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
 3 (1986). Plaintiffs have explained why every turnback is illegal regardless of the
 4 excuse for it, Op. Br. at 18-25; CM Opp. at 1-4, and will not belabor that point here.
 5 In addition, Defendants’ attempt to excuse their conduct have no factual support.
 6 The record shows that (a) the decision to start turning back asylum seekers in 2016
 7 was caused by media pressure, not the number of arriving noncitizens; (b) the
 8 decision to expand metering had nothing to do with the number of noncitizens
 9 arriving at Texas POEs; (c) turnbacks continued in 2017, when there were no
 10 capacity concerns at POEs; (d) Defendants’ concerns about the April 2018 migrant
 11 caravan were overblown; and (e) the turnback policy is costly and dangerous.

12 **A. Defendants Ignore What Actually Occurred in May 2016**

13 Defendants claim that their actions were justified because they were dealing
 14 with a “sustained and overwhelming surge of undocumented” noncitizens, and that
 15 by late May 2016 the San Ysidro POE simply could not hold any more noncitizens
 16 and started turning back asylum seekers. *See* CM at 1-3, 11. That is not true. In late
 17 May 2016, CBP officials on the ground at the San Ysidro POE repeatedly explained
 18 the steps that they were taking to deal with an uptick in arriving noncitizens at the
 19 port and their future plans for doing so. [REDACTED]
 20 [REDACTED]. *See, e.g.*, Op. Ex. 34 ([REDACTED]
 21 [REDACTED]
 22 [REDACTED]); Op. Ex. 39 ([REDACTED]
 23 [REDACTED]); Op. Ex. 38 ([REDACTED]
 24 [REDACTED]);
 25 Ex. 2 ([REDACTED]
 26 [REDACTED]). However, on May 25,
 27 2016, Pete Flores, the Director of Field Operations for OFO’s San Diego Field
 28 Office, told Todd Owen, then the Executive Assistant Commissioner of OFO, that

1 [REDACTED]
2 [REDACTED] Ex. 3. For his part, Todd Owen, the head of
3 OFO, [REDACTED]
4 [REDACTED] *Id.*

5 A day later, their nightmare came true—a day before Donald Trump, then the
6 presumptive Republican nominee for President, was scheduled to hold a campaign
7 rally in San Diego,² OFO's San Diego Field Office [REDACTED]
8 [REDACTED]
9 [REDACTED] Ex. 4; Ex. 5. A reporter sent CBP questions concerning [REDACTED]
10 [REDACTED] many of
11 whom "[REDACTED]" She
12 informed CBP that she would be "writing an article" in the near future. Op. Ex. 40
13 at 872. Members of California's Congressional delegation also knew that [REDACTED]
14 [REDACTED]
15 [REDACTED] Op. Ex. 40 at 870; Ex. 6; Ex. 7.

16 On May 26, 2016, the San Diego Union-Tribune published a story entitled
17 "Surge of Haitians at San Ysidro Port of Entry." The story noted that "more than
18 200 people were crowded inside the port's pedestrian entrance," even though the
19 San Ysidro POE had the ability to "process close to 25,000 northbound pedestrians
20 a day."³ This story got the attention of senior DHS officials, [REDACTED]
21 [REDACTED]. Ex. 8 at 631.

22 This was the breaking point for Defendants. They did not want to deal with
23 the media attention at the San Ysidro POE. On May 26, 2016, Pete Flores forwarded
24 an email chain regarding [REDACTED]
25 [REDACTED] to Sidney Aki, the Port Director of the San Ysidro POE. Ex. 9 at

26 _____
27 ² See, e.g., <https://www.youtube.com/watch?v=tl5CJy1Fijc>.

28 ³<https://www.sandiegouniontribune.com/news/border-baja-california/sdut-haitians-flood-san-ysidro-port-entry-2016may26-story.html>.

1 354. Mr. Flores told Mr. Aki: “[REDACTED]
 2 [REDACTED]” *Id.* Mr. Aki responded: “[REDACTED]” *Id.*; Ex. 10. Mr. Aki told his deputies:
 3 “[REDACTED]
 4 [REDACTED]” Op. Ex. 41. As Mr. Aki requested,
 5 on May 27, 2016, the San Ysidro POE took steps to [REDACTED]
 6 [REDACTED]
 7 [REDACTED]. *See, e.g.,* Op. Ex. 43.

8 Therefore, it was *media attention*, not increased numbers of undocumented
 9 noncitizens, that caused the San Ysidro POE to begin turning back asylum seekers.
 10 Defendants wanted those asylum seekers out of sight and out of mind. *See, e.g.,* Ex.
 11 1 at 10 (“We are hoping this thing just goes away.”). They also did not want to send
 12 a message that the San Ysidro POE had an efficient system for inspecting and
 13 processing asylum seekers, because that might be a “pull factor” for future
 14 immigration. *See* Op. Ex. 1 at 155:14-16 (Defendants refused to process asylum
 15 seekers because “[t]he more you process, the more will come.”).

16 **B. Defendants’ Pattern of Refusing to Process Asylum Seekers**

17 Defendants claim that it is mere happenstance that they decided to abandon
 18 plans to open processing centers for undocumented noncitizens. *See* CM at 18. Not
 19 so—it was, in fact, part of a pattern of refusing to efficiently process asylum seekers
 20 for fear of “pulling” more of them to the border. On May 27, 2016, [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]. Ex. 11; Ex.
 24 12 at 828. [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED] Ex. 12 at 828. Because
 28 Defendants were afraid that efficiently processing asylum seekers would be a “pull

factor,” they repeatedly refused to implement plans to inspect and process asylum seekers more efficiently. In November 2016, [REDACTED]
[REDACTED]
[REDACTED] Op. Br. 9-11. [REDACTED]
[REDACTED]
[REDACTED] Op. Ex. 3 at 69:12-70:2 (Hidalgo POE [REDACTED]
[REDACTED]). Then, when the leadership of OFO’s San Diego Field Office
[REDACTED]
[REDACTED], DHS Secretary Kirstjen Nielsen ordered [REDACTED]
[REDACTED] See, e.g., Op. Ex. 109 at 473-474; Op. Ex. 110; Op. Ex. 111.
Defendants’ attempt to isolate and explain away these incidents makes no sense.⁴

C. Defendants Continued to Turnback Asylum Seekers in 2017

Defendants claim that the “surge” of undocumented noncitizens arriving at POEs ended in 2017 and that turnbacks ended “for the most part” shortly thereafter. Opp. at 3, 21. Not so. CBP officers turned back asylum seekers at POEs in 2017. See, e.g., Op. Ex. 8 at 043 (January 2, 2017); Ex. 14 (January 26, 2017); Ex. 15 (February 6, 2017); Ex. 16 at 388 (February 2017 [REDACTED]
[REDACTED]); Ex. 17 (April 1, 2017); Op. Ex. 52 (DHS received [REDACTED]); Ex. 18 (April 10, 2017); Ex. 19 ([REDACTED])

⁴ It is incorrect that “[REDACTED]” caused the closure of El Centro. See CM at 18. The head of CBP’s Crisis Action Team noted that [REDACTED] Ex. 13 at 878. Furthermore, Defendants’ excuse for closing the Nogales Facility makes no sense. [REDACTED]

CM at 18. [REDACTED]
[REDACTED] Op. Ex. 61 at 530. The only significant change between November 4, 2016, when the Nogales Facility was on the path to opening, and November 15, 2016 when it was placed on hold, was that Donald Trump had been elected President and OFO had rolled out turnbacks border-wide. See Op. Br. at 10-11. [REDACTED]
[REDACTED]. See CM at 20.

1 [REDACTED]; Ex. 20 (May 12, 2017); Ex. 21 (May 18,
 2 2017); Ex. 22 at 395 (August 26, 2017); Ex. 23 at 411 (December 5, 2017); Ex. 24
 3 (December 7, 2017); Ex. 25 (December 8, 2017); Ex. 26 (December 9, 2017); Ex.
 4 27 (December 11, 2017); Ex. 28 (December 12, 2017); Ex. 29 (December 15, 2017);
 5 Ex. 30 (December 17, 2017); Ex. 31 at 450 (December 18, 2017). And those exhibits
 6 are a drop in the bucket. It is simply not true that Defendants stopped turning back
 7 asylum seekers in 2017. They kept turning back asylum seekers because the turnback
 8 policy has nothing to do with the capacity of POEs. *See* Ex. 38 at ¶¶ 22, 102-23; Ex.
 9 1 at 16 (San Luis POE staff admitted “they could process more asylum seekers than
 10 they were processing”).

11 **D. The April 2018 Migrant Caravan Never Materialized**

12 Defendants claim that CBP’s April 2018 metering guidance was issued in
 13 response to a fast-approaching migrant caravan that would overwhelm POEs. *See*
 14 CM at 22-23. But Defendants ignore their own data. From late March until late April
 15 2018, [REDACTED]. *See, e.g.*, Ex. 32. That
 16 data shows that [REDACTED].
 17 On March 31, 2018, [REDACTED] Op. Ex. 80 at 793. By
 18 April 22, 2018, [REDACTED]. *Id.* at 784. A
 19 day later, on April 23, 2018, there were only “[REDACTED]” in the group.
 20 *Id.* at 783. These [REDACTED] asylum seekers did not even reach Tijuana at the same time.
 21 *Id.* The Mexican government saw to it that caravan members “[REDACTED]
 22 [REDACTED]” *Id.* Many of
 23 the asylum seekers who reached Tijuana [REDACTED] were not even able
 24 to make it to the border. *Id.* Mexican authorities set up “[REDACTED]
 25 [REDACTED]” *Id.* That is why, by April 29, 2018,
 26 “[REDACTED]” Ex. 33 at 694. Even
 27 though the April 2018 migrant caravan was dispersed and would clearly pose *no*
 28 logistical challenges to POEs, Defendants persisted with their plan to memorialize

1 the turnback policy on April 27, 2018 and enforced that policy. *See* Op. Ex. 82.

2 **E. The Turnback Policy Is Costly, Dangerous, and Illegal**

3 Defendants claim that the turnback policy was “successful.” CM at 4. The
4 thousands of class members living in unofficial refugee camps on the Mexican side
5 of the border beg to differ.⁵



15 Under the turnback policy, CBP officers lied, and asylum seekers died. Op. Br. at
16 16-18, 26-27. Anyone who calls that a “success” needs to open a dictionary.

17 Even measured by other standards, the turnback policy is a terrible idea. CBP
18 officers repeatedly complained that it put their safety at risk. *See, e.g.*, Op. Ex. 1 at
19 172:14-17; Op. Ex. 3 at 149:23-150:1. Because “[t]he safety of CBP employees” is
20 supposed to be “paramount during all aspects of CBP operations,” CM Ex. 59 at
21 044, these safety flaws should have doomed the turnback policy from the start.

22 Moreover, turning back asylum seekers at the limit line between the U.S. and
23 Mexico created a new problem at POEs—so-called [REDACTED]” Op. Ex. 14 at
24 189:6-191:20. [REDACTED]

25 [REDACTED]. *Id.* at 198:25-

26
27 ⁵ Caitlin Dickerson, *Inside the Refugee Camp on America’s Doorstep*, N.Y. Times
28 (Oct. 25, 2020), <https://www.nytimes.com/2020/10/23/us/mexico-migrant-camp-asylum.html>.

1 199:16. This meant that CBP had to [REDACTED]
 2 [REDACTED]. Ex. 34. As a result, [REDACTED]
 3 [REDACTED]. *See, e.g.*, Ex. 35 at 190-191; Ex. 36 at 277 (“[REDACTED]
 4 [REDACTED]
 5 [REDACTED]”); Ex. 37 (“[REDACTED]
 6 [REDACTED]”). So, sure, the turnback policy was a wild
 7 “success”—all you need to do is ignore the fact that it killed and endangered asylum
 8 seekers, cost more money, placed CBP officers in harm’s way, and broke the law.

9 **F. Defendants Rely on Self-Contradictory Arguments**

10 In addition to getting the facts wrong, Defendants’ view of the facts is self-
 11 contradictory. A chief example of this is how Defendants cite CBP’s capacity data.
 12 When Defendants believe that POEs had high capacity utilization numbers,
 13 Defendants cite those documents as a justification for turning back asylum seekers.
 14 *See* CM at 15. But when POEs reported low capacity utilization numbers,
 15 Defendants argue that those figures are meaningless because “[a] port’s capacity to
 16 hold individuals is not a fixed number,” CM at 24, and the figures are therefore
 17 incomplete and inaccurate. *Id.* These figures are either meaningful or meaningless,
 18 but Defendants cannot have it both ways. And “capacity” is certainly not a one-way
 19 ratchet. Defendants focus on factors constraining capacity ignores ways that they
 20 could expand their capacity by utilizing U.S. Border Patrol stations and soft-sided
 21 facilities. Therefore, Defendants’ attempt to conjure factual disputes is not genuine.
 22 It cannot defeat summary judgment. *See Scott*, 550 U.S. at 380 (“When opposing
 23 parties tell two different stories, one of which is blatantly contradicted by the record,
 24 so that no reasonable jury could believe it, a court should not adopt that version of
 25 the facts for purposes of ruling on a motion for summary judgment.”).

26 **IV. EVEN IF DEFENDANTS ARE CORRECT THAT TURNBACKS ARE** 27 **A DELAY, THAT DELAY IS UNREASONABLE**

28 Plaintiffs maintain that turnbacks amount to unlawful withholding of a

1 mandatory duty in every instance, but Plaintiffs are entitled to summary judgment
 2 on their APA § 706(1) claim even if Defendants are correct in characterizing
 3 turnbacks as “[a]t most, agency action [that] is delayed.” CM at 40. Such delays are
 4 unreasonable across the board under the “*TRAC* factors.” See *Indep. Mining Co. v.*
 5 *Babbitt*, 105 F.3d 502, 507 & n.7 (9th Cir. 1997) (citing *Telecomms. Research &*
 6 *Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)).⁶ Based on the undisputed facts,
 7 the *TRAC* analysis weighs heavily in Plaintiffs’ favor.

8 **Factor 1:** When and whether a metered asylum seeker will ever be processed
 9 under the turnback policy is an arbitrary decision made in a black box and is not
 10 based on a “rule of reason.” Wait times for metered asylum seekers have ranged
 11 from days to many months, [REDACTED]. CM Opp.
 12 Exs. 6-7; Op. Ex. 100 at 247:2-5. Various features of the turnback policy make clear
 13 the arbitrary nature of these inspection delays. Defendants require asylum seekers to
 14 use a waitlist system operated by third parties in Mexico, but do not know how the
 15 system works or even *if* it works, or how long the delay might take. Op. Ex. 14 at
 16 108:1-5 (“[REDACTED]”
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]”); Op. Ex. 17 at 301:13-16 (“C [REDACTED]”
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]”). Defendants merely inspect and process the number of
 23

24 ⁶ The *TRAC* factors are: (1) whether the agency’s timeline is governed by a “rule of
 25 reason”; (2) whether “Congress has provided a timetable or other indication of the speed
 26 with which it expects the agency to proceed in the enabling statute”; (3) & (5) (usually
 27 considered together) the “nature and extent of the interests prejudiced by the delay,” with
 28 delays “that might be reasonable in the sphere of economic regulation are less tolerable
 when human health and welfare are at stake”; (4) “the effect of expediting delayed action
 on agency activities of a higher or competing priority”; and (6) whether the agency acted
 in bad faith, though bad faith is not necessary to find a delay unreasonable. *Id.* at 507
 n.7.

1 individuals Defendants requested from Mexican officials that day (if they requested
 2 any at all). *See* Op. Ex. 4 at 171:7-13. But there is no guarantee that operation of the
 3 waitlists is not completely arbitrary—that Mexican officials will follow the order on
 4 the lists, Dkt. 591-1 ¶¶ 8-10, or that all class members will even be allowed to utilize
 5 the lists, Dkt. 390-101 ¶¶ 12-13. Class members are thrown to the proverbial
 6 wolves—turned back, told to participate in an opaque, informal waitlist “process”
 7 that may or may not return them to the POE for processing and inspection, and left
 8 to survive on their own in the interim.⁷ “The ‘rule’ appears to be that once”
 9 Defendants prevent an asylum seeker from accessing the POE, they “abdicate[]
 10 responsibility for” what happens next. *Hong Wang v. Chertoff*, 550 F. Supp. 2d 1253,
 11 1259 (W.D. Wash. 2008). “Where [Defendants] ha[ve] been assigned the mandatory
 12 duty to [inspect arriving noncitizens], this policy cannot be considered a ‘rule of
 13 reason.’” *Id.*

14 Furthermore, the “Prioritization-Based Queue Management” memos inject
 15 unwarranted discretion into the decision to inspect any asylum seekers at all, which
 16 in turn impacts inspection wait times. Op. Ex. 98; CM Ex. 5. Under the memos,
 17 POEs “must” prioritize certain activities ahead of inspecting and processing asylum
 18 seekers, after which they “have discretion to allocate resources and staffing” as they
 19 wish. Op. Ex. 98; CM Ex. 5. Purporting to grant agency actors *discretion* to
 20 undertake a *mandatory* duty runs counter to the principle of reasoned
 21 decisionmaking; “[t]he APA is not intended to permit agencies to define the
 22 reasonability of their actions by issuing their own memoranda.” *Asmai v. Johnson*,
 23 182 F. Supp. 3d 1086, 1095 (E.D. Cal. 2016). Merely adopting a policy to delay
 24
 25

26 ⁷ Op. Ex. 14 at 234:25-235:20 (if CBP prevents an asylum seeker from crossing the
 27 limit line. “
 28

1 inspecting asylum seekers, as Defendants did here, is not a rule of reason. *Id.*⁸

2 **Factor 2:** The “statutory context” strongly suggests that any delay of days,
3 weeks, or months before an asylum seeker is inspected is unreasonable. *Santillan v.*
4 *Gonzales*, 388 F. Supp. 2d 1065, 1083 (N.D. Cal. 2005). As this Court has previously
5 held, § 1225(a)(3) requires Defendants to inspect all noncitizens who are in the
6 process of arriving at a POE. Dkt. 280 at 45-46. The duty does not apply only with
7 regard to asylum seekers—it encompasses all who are “applicants for admission” or
8 “otherwise seeking admission.” Inspections must occur around the time that a
9 noncitizen arrives at the POE, rather than days, weeks, or months, later.⁹ And CBP
10 handily inspects nearly all of the hundreds of thousands of people subject to
11 inspection each day, in roughly the order the applicants arrive. These inspections are
12 the bread and butter of POEs’ functioning, and international travel would grind to a
13 halt if such inspections did not occur as a matter of course upon arrival. If CBP
14 officers at airports delayed inspections for weeks, arriving travelers would be stuck
15 sleeping inside airports. At land borders, students would never make it to school,
16 and employees would miss work if inspections were not required at the time of
17 arrival. Indeed, Defendants never acted otherwise prior to the adoption of the
18 turnback policy. Op. Ex. 14 at 53:21-56:1 (CBP 30(b)(6) witness with 21 years of
19 service at CBP and its predecessor agency could not recall [REDACTED])

20 [REDACTED]
21 [REDACTED]). The reasonable timeframe for the statutory inspection duty must
22 be interpreted in the context of this daily hubbub at POEs that the statute is meant to
23 regulate.

24 _____
25 ⁸ In addition, wait times are disconnected from the actual capacity of ports of entry,
26 further eroding any claim that the challenged delays are based on a rule of reason.
27 See Op. Br. 26-29; CM Opp. at 11-18.

28 ⁹ Congress’s decision to create special protections for asylum seekers arriving in the
United States—barring their expedited removal without first giving them access to
the asylum process, § 1225(b)(1)(A)(i)-(ii)—reinforces the point that metering is
unreasonable because it places such individuals in danger.

1 **Factors 3 & 5:** The nature and extent of the interests prejudiced by the
2 turnback policy—human life and physical well-being—cannot be overstated and
3 weigh strongly in Plaintiffs’ favor. The scale of the crisis created by turnbacks has
4 been enormous, and it includes makeshift camps in Mexican border towns that lack
5 toilets and clean water, as well as human trafficking and violence against those
6 forced to wait. *See* Op. Br. at 16-18. Courts routinely find these factors weigh in
7 favor of relief based on much less serious harm. *Singh v. Napolitano*, 909 F. Supp.
8 2d 1164, 1176 (E.D. Cal. 2012) (finding this factor weighed in a petitioner’s favor
9 because it involved “humanitarian concerns”—Singh was “an asylee who [was]
10 attempting to become a lawful permanent resident”); *Tufail v. Neufeld*, 2016 WL
11 1587218, at *8 (E.D. Cal. 2016) (ongoing insecurity about one’s immigration status
12 weighed in favor of relief); *Latifi v. Neufeld*, 2015 WL 3657860, at *7 (N.D. Cal.
13 2015) (being required to renew work authorization every year was a hardship
14 weighing in plaintiff’s favor).

15 **Factor 4:** While Defendants argue that turnbacks are justified by a
16 discretionary decision to prioritize other activities, Defendants’ own records show
17 that they routinely engaged in metering even when the processing of asylum seekers
18 was not impacting port operations. Op. Ex. 38 at ¶¶ 22, 101-23. But “[e]ven
19 assuming that [Defendants] have numerous competing priorities under the fourth
20 factor,” delay may still be unreasonable when other factors weigh heavily in favor
21 of relief, and particularly when “there is a clear threat to human welfare.” *In re*
22 *Community Voice*, 878 F.3d 779, 787 (9th Cir. 2017) (finding unreasonable delay
23 when children were “severely prejudiced” by lead poisoning, even assuming the
24 agency acted in good faith to juggle competing priorities); *Cutler v. Hayes*, 818 F.2d
25 879, 898 (D.C. Cir. 1987) (“[An agency’s] plea[s] of . . . administrative convenience,
26 practical difficulty in carrying out a legislative mandate, or need to prioritize in the
27 face of limited resources . . . become less persuasive as delay progresses, and must
28 always be balanced against the potential for harm.”). Furthermore, “if the only effect

1 of expediting [agency action] is the loss of an authority that . . . is *ultra vires*,” such
2 as turning away asylum seekers, *see* Op. Br. at 7-16, the fourth factor “does not
3 militate in [the agency’s] favor.” *Mugumoke v. Curda*, 2012 WL 113800, at *9 (E.D.
4 Cal. 2012).

5 **Factor 6:** This Court may also invalidate the turnback policy because it was
6 adopted in bad faith. While a finding of bad faith is not necessary for a court to find
7 unreasonable delay, in this case each turnback and the turnback policy are
8 unlawful—resulting in delay that is unreasonable *per se* under the *TRAC* factors
9 because turnbacks were based on a pretext and not driven by capacity constraints,
10 and are therefore the result of bad faith. *Cutler*, 818 F.2d at 898 (“If the court
11 determines that the agency delays in bad faith, it should conclude that the delay is
12 unreasonable.”). Here, Defendants have “manifested bad faith . . . by singling . . .
13 out [asylum seekers] for bad treatment,” based on a pretextual excuse of lack of
14 capacity, and therefore, they “will have a hard time claiming legitimacy for [their]
15 priorities.” *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991); Op. Br. at 26-
16 29; CM Opp. 11-18.¹⁰

17 In addition, Defendants are not “free to make . . . administrative changes with
18 the intent to defeat the mandate of the law by making the process so slow and/or
19 cumbersome to ensure” that only a small number of asylum seekers are ever
20 processed at POEs. *Babbitt*, 105 F.3d at 510. Yet that is exactly what Defendants
21 did. Defendants engaged in turnbacks to avoid projecting a public image of an
22 efficient system for processing asylum seekers at the border, in an effort to deter
23 people from attempting to access that system. *See supra* at 3-5. This manufactured
24 delay evinces bad faith. *Babbitt*, 105 F.3d at 510.

25 **V. PLAINTIFFS ARE ENTITLED TO THE RELIEF THEY SEEK**

26 _____
27 ¹⁰ The turnback policy was also adopted in bad faith because it is the result of long-
28 standing racial animus toward Haitian asylum seekers, Dkt. 600-2 at 3-19, and a
desire to deter all asylum seekers, Dkt. 601-2 at 3-19.

1 **A. The Court Should Enter a Permanent Injunction**

2 The Court should enter a permanent injunction prohibiting all forms of
3 turnbacks, requiring Defendants to inspect asylum seekers as they arrive at POEs,
4 and restoring those previously metered to their legal status quo ante. Injunctive relief
5 is necessary because Defendants' turnback policy reveals "past and present
6 misconduct [that] indicates a strong likelihood of future violations." *Orantes-*
7 *Hernandez v. Thornburgh*, 919 F.2d 549, 564 (9th Cir. 1990). This "past and present
8 misconduct" consists of more than the countless individual turnbacks committed by
9 CBP officers, because Defendants chose not to memorialize the turnback policy for
10 nearly two years. *See* Op. Br. at 12-15, 36. Thus, appropriate relief for Defendants'
11 policy of denying asylum seekers access to the U.S. asylum process must address
12 not only the memorialized aspects of this policy but all the past and present practices
13 that have been used under the policy to effectuate and legitimize turnbacks. This
14 Court should not ignore the likelihood of future violations that Defendants' past
15 practice reveals, and that injunctive relief is meant to address.¹¹

16 **B. Vacatur Is Not Appropriate or Sufficient Relief**

17 Defendants' argument that vacatur is an adequate alternative remedy is
18 without merit. Tellingly, Defendants never specify *what* exactly this court could
19 vacate to provide Plaintiffs the relief they seek. Nor could they. Plaintiffs do not
20 challenge a single regulation, memo, or executive order, but rather a comprehensive
21 policy to deny asylum seekers access to the U.S. asylum process that was enacted
22 through multiple directives because Defendants decided not to memorialize their
23 illegal conduct for nearly two years. Vacating a single memorandum or directive
24 will not stop Defendants from creating new directives to achieve the same objective.
25 In fact, the uncontested facts demonstrate that since 2016, when challenges to

26 _____
27 ¹¹ Although Plaintiffs submit that they are entitled to injunctive and declaratory
28 relief, the parties agree that briefing on the appropriate scope of the remedy
following the Court's ruling on the merits may be warranted. *See* CM at 58.

Defendants’ practices of turning back asylum seekers first arose, Defendants’ created new directives to explain and justify these practices. *See* Op. Br. at 12-15. Even after OIG suggested that CBP’s decision to stop processing asylum seekers at seven POEs was illegal, CBP still refused to change its conduct. Ex. 1 at 21. The only way “to combat [such] a ‘pattern’ of illicit . . . behavior” is to prohibit all forms of turnbacks and affirmatively require Defendants to inspect asylum seekers as they arrive at POEs. *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985) (“[t]he Supreme Court has repeatedly upheld the appropriateness of federal injunctive relief” to address such patterns of behavior), *amended on other grounds by* 796 F.2d 309 (9th Cir. 1986). That vacatur may be an adequate remedy for certain APA violations does not make it an adequate remedy for the APA violations in this case.¹²

C. Plaintiffs Meet the Remaining Factors for Injunctive Relief

Plaintiffs meet all the requisite factors for permanent injunctive relief. *See Sierra Club v. Trump*, 963 F.3d 874, 895 (9th Cir. 2020); Op. Br. 26-39; *supra* at 16. *First*, Defendants do not argue that Plaintiffs have failed to show irreparable injury, and therefore Defendants concede the harm. *See* CM at 58-60; *see Day v. D.C. DCRA* 191 F. Supp. 2d 154, 159 (D.D.C. 2002). Regardless, it is uncontroversial that Defendants’ commission of statutory, constitutional, and international legal violations that put asylum seekers in grave danger in Mexico and deny them access to the U.S. asylum process constitutes irreparable harm. *See Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1093 (9th Cir. 2020) (returning non-Mexicans to Mexico where they “risk substantial harm, even death” while waiting for further steps in the U.S. asylum process constitutes irreparable injury).

¹² The two cases Defendants cite to support their vacatur argument are inapposite. *California Wilderness Coalition v. U.S. Dep’t of Energy* analyzed a specific government study issued in violation of statutory guidelines—not a series of multiple directives and practices comprising an unwritten policy. 631 F.3d 1072, 1095 (9th Cir. 2011). *Monsanto Co. v. Geertson Seed Farms* is irrelevant because the Plaintiff in that case agreed that vacatur was sufficient—not so here. 561 U.S. 139, 165-66 (2010).

1 *Second*, the balance of the hardships and the public interest—which should be
2 considered together when the government is a party—weigh in favor of Plaintiffs.
3 *See Sierra Club*, 963 F.3d at 895. Without injunctive relief, class members will
4 continue to face the statutory, constitutional, and international law violations that
5 result in grave risk of serious harm and even death in Mexico. *See Op. Br.* at 26-39.
6 Defendants’ hardship, even if administratively burdensome, amounts to fulfilling
7 their statutory mandate, which they are not allowed to neglect or diminish in any
8 way. Defendants direct the Court to 6 U.S.C. § 211(c), *see CM at passim*, which
9 requires that CBP “enforce and administer all immigration laws . . . including . . .
10 the inspection, processing, and admission of persons who seek to enter . . . the United
11 States.” *Id.* § 211(c)(8)(A). Until the turnback policy, CBP fulfilled this statutory
12 mandate and processed asylum seekers in the same way they process everyone else
13 arriving at the U.S.-Mexico border; that is, in the order that they arrive. Any
14 diversion of resources or costs associated with enjoining the turnback policy and
15 returning to prior lawful practices would be hardships of Defendants’ own making.

16 And, “[t]here is generally no public interest in the perpetuation of unlawful
17 agency action.” *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir.
18 2016); *see also EBSC v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018) (the public “has
19 an interest in ensuring that ‘statutes enacted by [their] representatives’ are not
20 imperiled by executive fiat”). An injunction ensuring access to the U.S. asylum
21 process will “prevent[] [noncitizens] from being wrongfully removed, particularly
22 to countries where they are likely to face substantial harm,” which is “of course” in
23 the public interest. *Nken v. Holder*, 556 U.S. 418, 436 (2009). Thus, Plaintiffs have
24 satisfied the requirements for injunctive relief and the Court should enter an
25 injunction prohibiting all forms of turnbacks, requiring Defendants to inspect asylum
26 seekers as they arrive at POEs, and restoring previously-metered asylum seekers to
27
28

1 the same legal status they would have had absent metering.¹³

2 **D. 8 U.S.C. § 1252(f)(1) Does Not Bar Relief**

3 Section 1252(f)(1) does not bar injunctive relief in this case, because Plaintiffs
 4 seek to enforce 8 U.S.C. § 1225(a) and (b), and not to “enjoin or restrain the
 5 operation of” the statute. Although § 1252(f)(1) serves to limit injunctive relief, it
 6 does so only so far as an injunction would “enjoin or restrain the operation of” certain
 7 removal statutes within the INA. It does not limit an injunction seeking to enjoin “a
 8 violation of the statutes.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010);
 9 *see Torres v. U.S. Dep’t of Homeland Sec.*, 411 F. Supp. 3d 1036, 1050 (C.D. Cal.
 10 2019) (holding that § 1252(f)(1) does not apply where the relief, “far from
 11 preventing the operation of the INA, seeks to enforce its provisions”).

12 Plaintiffs seek to enjoin agency action that violates Defendants’ inspection
 13 and processing duties under § 1225(a) and (b). *See* Op. Br. at 36-38. Where, as here,
 14 Plaintiffs “seek[] to enjoin conduct that allegedly is not even authorized by the
 15 statute, the court is not enjoining the operation of [the removal statutes], and §
 16 1252(f)(1) therefore is not implicated.” *Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir.
 17 2003), *vacated on other grounds sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir.
 18 2005). Defendants strain to make § 1252(f)(1) apply by arguing that Plaintiffs are
 19 seeking to enjoin the operation of § 1225(a) and (b) “by rewriting it to apply to aliens
 20 outside the United States.” CM at 58. First, this mischaracterization blatantly
 21 disregards this Court’s prior finding that “the plain language and legislative
 22 histor[y]” of § 1225(b) “support[] the conclusion that the statute applies to asylum
 23 seekers in the process of arriving.” Dkt. 330 at 5. Furthermore, because the turnback
 24 policy denies the operation of § 1225(a) and (b) to those asylum seekers in the
 25 process of arriving, Plaintiffs seek to enjoin a violation of the statute. Defendants

26 _____

27 ¹³ If questions about interpretation and implementation arise with respect to any
 28 permanent injunction, this Court can appointment a special master to oversee the
 implementation of the injunction. *See* Fed. R. Civ. P. 53(a) (1)(C).

1 may not like the Court's prior holding, but they certainly may not buttress a failed
 2 legal argument into a bar to relief. Section 1252(f)(1) "is not implicated" in this case
 3 and, therefore, does not bar the injunctive relief Plaintiffs seek. *Ali*, 346 F.3d at 886.

4 **E. The Court Should Enter Declaratory Relief**

5 In addition to injunctive relief, this Court should enter a declaratory judgment
 6 that the turnback policy violates the INA, the APA, class members' procedural due
 7 process rights under the Fifth Amendment, and the Alien Tort Statute.¹⁴
 8 "[D]eclaratory relief has long been recognized as distinct in purpose from . . .
 9 injunctions." *Rodriguez*, 591 F.3d at 1120; see *McGraw-Edison Co. v. Preformed*
 10 *Line Products Co.*, 362 F.2d 339, 342 (9th Cir. 1966). Here, in addition to an
 11 injunction prohibiting all turnbacks, a declaration from the Court that turnbacks
 12 violate § 1225(b) "will serve a useful purpose in clarifying the legal relations at
 13 issue" between arriving noncitizens and CBP officers. *GEICO v. Dizol*, 133 F.3d
 14 1220, 1225 n.5 (9th Cir. 1998).¹⁵ Declaratory relief would also be of assistance to
 15 CBP officers who are "still unclear" on whether turnbacks are illegal. Ex. 1 at 12.
 16 This Court should grant the requested injunctive and declaratory relief.

17 **VI. CONCLUSION**

18 Summary judgment should be entered for Plaintiffs.

19 Dated: October 30, 2020

20 **MAYER BROWN LLP**

21 ¹⁴ Notably, a declaratory judgment is not barred by 8 U.S.C. § 1252(f)(1).

22 ¹⁵ Defendants' reliance on *Sanchez-Espinoza v. Reagan* is misplaced. 770 F.2d 202,
 208 n.8 (D.C. Cir. 1985). In *Sanchez-Espinoza*, the court questioned whether it could
 23 grant discretionary relief of any kind where it was asked to address the legality of
 24 support for military operations in a foreign country. *Id.* at 208. The court clarified
 25 that "*in a context such as this* where federal officers are defendants," a declaratory
 26 judgment to terminate support would be "the practical equivalent of specific relief
 27 such as an injunction or mandamus." *Id.* at 208 n.8 (emphasis added). Here, the
 28 declaratory and injunctive relief would not have an equivalent effect. The
 declaratory relief would establish CBP officers' legal obligations to those in the
 process of arriving, something that [REDACTED]. See Op.
 Ex. 1 at 163:11-165:18; Op. Ex. 76 at 110, 115-126. In contrast, injunctive relief
 would prohibit specific actions by CBP officers. In *this* case, both are necessary to
 afford Plaintiffs and class members complete relief.

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Matthew H. Marmolejo
Ori Lev
Stephen M. Medlock

SOUTHERN POVERTY LAW CENTER
Melissa Crow
Sarah Rich
Rebecca Cassler

CENTER FOR CONSTITUTIONAL
RIGHTS
Baher Azmy
Ghita Schwarz
Angelo Guisado

AMERICAN IMMIGRATION COUNCIL
Karolina Walters

By: /s/ Stephen M. Medlock
Stephen M. Medlock

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all counsel via the Court's CM/ECF system.

Dated: October 30, 2020

MAYER BROWN LLP

By /s/ Stephen M. Medlock

REPLY IN SUPP. OF
PLTFS' MOT S.J.

1 MAYER BROWN LLP
 2 Matthew H. Marmolejo (CA Bar No. 242964)
 3 *mmarmolejo@mayerbrown.com*
 4 350 S. Grand Avenue
 5 25th Floor
 6 Los Angeles, CA 90071-1503
 7 Ori Lev (DC Bar No. 452565)
 8 (*pro hac vice*)
 9 *olev@mayerbrown.com*
 10 Stephen M. Medlock (VA Bar No. 78819)
 11 (*pro hac vice*)
 12 *smedlock@mayerbrown.com*
 13 1999 K Street, N.W.
 14 Washington, D.C. 20006
 15 Telephone: +1.202.263.3000
 16 Facsimile: +1.202.263.3300

17 SOUTHERN POVERTY LAW CENTER
 18 Melissa Crow (DC Bar No. 453487)
 19 (*pro hac vice*)
 20 *melissa.crow@splcenter.org*
 21 1101 17th Street, N.W., Suite 705
 22 Washington, D.C. 20036
 23 Telephone: +1.202.355.4471
 24 Facsimile: +1.404.221.5857

25 *Additional counsel listed on next page*
 26 *Attorneys for Plaintiffs*

27 **UNITED STATES DISTRICT COURT**
 28 **SOUTHERN DISTRICT OF CALIFORNIA**

Al Otro Lado, Inc., *et al.*,

Plaintiffs,

v.

Chad F. Wolf,¹ *et al.*,

Defendants.

Case No.: 17-cv-02366-BAS-KSC

**PLAINTIFFS' OPPOSITION TO
 DEFENDANTS' CROSS-MOTION
 FOR SUMMARY JUDGMENT**

PUBLIC REDACTED VERSION

**NO ORAL ARGUMENT UNLESS
 REQUESTED BY THE COURT**

¹ Defendants have represented that Mr. Wolf is the Acting Secretary of the U.S. Department of Homeland Security. Numerous courts disagree. *Casa de Md., Inc. v. Wolf*, 2020 WL 5500165, at *23 (D. Md. Sept. 11, 2020); *Immigrant Legal Res. Ctr. v. Wolf*, 2020 WL 5798269, at *7-9 (N.D. Cal. Sept. 29, 2020); *N.W. Immigrant Rights Project v. USCIS*, 2020 WL 5995206, at *24 (D.D.C. Oct. 8, 2020).

1 CENTER FOR CONSTITUTIONAL RIGHTS

2 Baher Azmy (NY Bar No. 2860740) (*pro hac vice*)

3 *bazmy@ccrjustice.org*

4 Ghita Schwarz (NY Bar No. 3030087) (*pro hac vice*)

5 *gschwarz@ccrjustice.org*

6 Angelo Guisado (NY Bar No. 5182688) (*pro hac vice*)

7 *aguisado@ccrjustice.org*

8 666 Broadway, 7th Floor

9 New York, NY 10012

10 Telephone: +1.212.614.6464

11 Facsimile: +1.212.614.6499

12 SOUTHERN POVERTY LAW CENTER

13 Sarah Rich (GA Bar No. 281985) (*pro hac vice*)

14 *sarah.rich@splcenter.org*

15 Rebecca Cassler (MN Bar No. 0398309) (*pro hac vice*)

16 *rebecca.cassler@splcenter.org*

17 150 E. Ponce de Leon Ave., Suite 340

18 Decatur, GA 30030

19 Telephone: +1.404.521.6700

20 Facsimile: +1.404.221.5857

21 AMERICAN IMMIGRATION COUNCIL

22 Karolina Walters (DC Bar No. 1049113) (*pro hac vice*)

23 *kwalters@immcouncil.org*

24 1331 G St. NW, Suite 200

25 Washington, D.C. 20005

26 Telephone: +1.202.507.7523

27 Facsimile: +1.202.742.5619

28

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abbreviation and Citation form

“ATS” refers to the Alien Tort Statute.

“CBP” refers to U.S. Customs and Border Protection.

“CM” refers to Defendants’ Cross-Motion for Summary Judgment (*see* Dkt. 562).

“Def. Ex.” refers to the exhibits to Defendants’ Cross-Motion for Summary Judgment (*see* Dkt. 562-2, *et seq.*).

“DHS” refers to the U.S. Department of Homeland Security.

“HSA” refers to the Homeland Security Act.

“INA” refers to the Immigration and Nationality Act.

“Op. Br.” refers to Plaintiffs’ Opening Brief in Support of their Motion for Summary Judgment (*see* Dkt. 533).

“Op. Ex.” refers to the exhibits to Plaintiffs’ Opening Brief in Support of their Motion for Summary Judgment (*see* Dkt. 533-2, *et seq.*).

“POE” refers to Class A Ports of Entry on the U.S.-Mexico border.

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1 **I. INTRODUCTION**

2 There is no genuine dispute about what happened here. Defendants
3 implemented a policy that resulted in asylum seekers being turned back from POEs
4 on the U.S.-Mexico border. There is also no genuine dispute that CBP officers turned
5 back asylum seekers who either (a) were in the process of arriving in the United
6 States at a POE or (b) had already set foot on U.S. soil.

7 Rather than addressing *what* occurred, Defendants' cross-motion spends
8 dozens of pages on *post-hoc* rationalizations for *why* the turnbacks happened.
9 Plaintiffs have shown that the purported reason for these turnbacks—so-called
10 “capacity” constraints—is pretextual, *see* Op. Br. at 26-29, but more fundamentally,
11 Defendants' asserted justification for the turnbacks is not relevant. The INA
12 **mandates** that Defendants inspect and process asylum seekers arriving in the United
13 States. Dkt. 280 at 47; *Al Otro Lado, Inc. v. Wolf*, 952 F.3d 999, 1011, 1013 (9th Cir.
14 2020) (this Court's interpretation of the INA has “considerable force” and is “likely
15 correct”). Moreover, the HSA states that “ensur[ing] that the functions of [CBP] . . .
16 that are not related directly to securing the homeland,” such as inspecting and
17 processing asylum seekers, are not “**diminished or neglected except by a specific**
18 **explicit Act of Congress.**” 6 U.S.C. § 111(b)(1)(E) (emphasis added). In addition,
19 Defendants' mandatory duty to inspect and process asylum seekers in the process of
20 arriving in the U.S is a co-equal part of Defendants' “primary mission.”² 6 U.S.C. §
21 111(b)(1)(D) (DHS' “primary mission” includes “carry[ing] out all functions of
22 entities transferred to [DHS]”).³ Defendants are not permitted to diminish⁴ that duty
23

24 ² Primary means “of chief importance.” *Primary*, Oxford English Dictionary (2020);
25 *Primary*, Cambridge Dictionary (2020) (“more important than anything else”).

26 ³ 8 U.S.C. § 1225 sets out duties to be performed by “immigration officers,” defined
27 in 8 U.S.C. 1101(a)(18), (34), to include employees of DHS's predecessor agency,
28 the Immigration and Naturalization Service.

⁴ Diminished means “to make or cause to appear less; reduce in size, number, or
degree.” *Wyeth v. Sandoz, Inc.*, 570 F. Supp. 2d 815, 829 (E.D.N.C. 2008);
Diminished, Oxford English Dictionary (2020) (“Made smaller or lessened”).

1 by relegating it to secondary status absent a specific and explicit Act of Congress.
2 And no Act of Congress authorizes a diminishment or neglect of the duty to inspect
3 arriving noncitizens at POEs due to Defendants' own analysis of the relative
4 importance of their missions.

5 Defendants turned back asylum seekers who were in the process of arriving
6 in the U.S. at POEs. *See, e.g.,* Op. Br. at 22-23. Defendants did so because they chose
7 to diminish the priority given to inspecting and processing asylum seekers. For
8 example, on June 5, 2018, Defendants adopted a policy memorandum that ***explicitly***
9 ***diminishes*** the importance of inspecting and processing asylum seekers, ordering
10 POEs to prioritize other missions over that one. Op. Ex. at 98 at 296. DHS adopted
11 this policy with ***specific knowledge*** that de-prioritizing the inspection and processing
12 of asylum seekers would result in [REDACTED]

13 [REDACTED]. *See* Op. Exs. 93-97.

14 Defendants have admitted what they did. The former head of CBP's Office of
15 Field Operations ("OFO"), Todd Owen, testified that Defendants decided to de-
16 prioritize inspecting and processing asylum seekers. Op. Ex. 10 at 201:20-203:3; *see*
17 *also* Def. Ex. 1 at ¶ 10 (conceding that "priority is given" to missions other than
18 processing and inspecting asylum seekers). The question is, was it legal? If the
19 separation of powers means anything, the answer is clearly no. Defendants had no
20 discretion to turn back asylum seekers who were in the process of arriving in the
21 U.S. Nor did they have the authority to make inspection and processing of asylum
22 seekers a secondary mission. Therefore, every turnback is illegal regardless of
23 Defendants' justification for it. That ends the inquiry.

24 Defendants spend most of their brief explaining why breaking the law might
25 result in preferable policy outcomes. They claim that by unilaterally diminishing
26 their capacity to inspect and process asylum seekers they have been able to focus on
27 interdicting drugs and to reduce overtime. CM at 25-31; Def. Ex. 1 at ¶ 9. They argue
28 that turning back asylum seekers enables them to avoid taxing the resources of CBP

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1 during upticks in the number of noncitizens arriving at POEs. *See* CM at 25-30. But
2 Defendants are executive-agency officials, not legislators. They are not authorized
3 to rewrite the INA. *See* Dkt. 280 at 65 (“the Executive cannot ‘amend the INA’ . . .
4 through executive action to establish a procedure at variance with the scheme
5 Congress chose.”). As heads of agencies, they are bound to comply with the non-
6 discretionary directives of governing statutes. *Util. Air Regulatory Grp. v. EPA*, 573
7 U.S. 302, 327-28 (2014) (“The power of executing the laws . . . does not include a
8 power to revise clear statutory terms,” and a “core administrative-law principle [is]
9 that an agency may not rewrite clear statutory terms to suit its own sense of how the
10 statute should operate.”); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91
11 (2002) (“Regardless of how serious the problem an administrative agency seeks to
12 address, . . . it may not exercise its authority in a manner that is inconsistent with the
13 administrative structure Congress enacted into law.”).⁵ Congress gave Defendants
14 specific and mandatory instructions on inspecting and processing asylum seekers
15 and no discretion to diminish their capacity to do so. *See Chevron, U.S.A., Inc. v.*
16 *Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (“If the intent of Congress
17 is clear, that is the end of the matter.”). Defendants’ desire to manage the “‘flow of
18 traffic’ across the border,” does not give them “the authority to rewrite specific
19 congressional mandates or to pretend that such mandates do not exist.” Dkt. 280 at
20 58; *see also Burrage v. United States*, 571 U.S. 204, 218 (2014) (“The role of this
21 Court is to apply the statute as it is written—even if we think some other approach
22 might ‘accor[d] with good policy.’”); *Pereira v. Sessions*, 138 S. Ct. 2105, 2118
23 (2018) (the government may not “pivot away from [a statute’s] plain language” by
24 “rais[ing] . . . practical concerns” because “practical considerations . . . do not justify
25 departing from the statute’s clear text”).

26
27 ⁵ *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000)
28 (despite the fact that the FDA was acting to address “one of the most troubling public
health problems facing our Nation today,” it lacked the authority to act where
“Congress ha[d] clearly precluded” the agency from doing so).

Defendants conjure a parade of horrors that might emerge if they are forced to obey governing statutes, *see* Def. Ex. 1 at ¶¶ 16-26, but that is an issue for Congress to address. *See, e.g., Lewis v. City of Chi.*, 560 U.S. 205, 217 (2010) (“[I]t is not our task to assess the consequences of each approach [to interpreting a statute] and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted.”); *United States v. Locke*, 471 U.S. 84, 95 (1985) (“[T]he fact that Congress might have acted with greater . . . foresight does not give courts a carte blanche to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do.”). Even if the Court were to credit Defendants’ speculation about what would occur absent the turnback policy, “[t]here surely are enforcement measures that [Defendants] can take to ameliorate the crisis” that they claim exists, and Defendants’ speculation “is not a sufficient basis under our Constitution for the Executive to rewrite our immigration laws.” *EBSC v. Trump*, 932 F.3d 742, 774-75 (9th Cir. 2018) (“[A]s much as we might be tempted to revise the law as we think wise, revision of the laws is left with . . . Congress.”).

There are three principal reasons why Plaintiffs should prevail on summary judgment. **First**, Congress gave Defendants no discretion to turn back asylum seekers who are in the process of arriving in the U.S. Defendants’ policy preferences do not permit them to ignore the plain language of the INA. Moreover, Defendants misconstrue the factual record; the undisputed facts show that the turnback policy was arbitrary and capricious. **Second**, this Court has already rejected Defendants’ due process argument, and Defendants provide no reason to reconsider that prior holding. **Third**, this Court should grant Plaintiffs’ motion for summary judgment on their ATS claim because Defendants in no way dispute that the duty of *non-refoulement* is a non-derogable *jus cogens* norm that is cognizable under the ATS.⁶

⁶ Defendants oppose Plaintiffs’ request for declaratory and injunctive relief. *See* CM at 58-60. Plaintiffs will address this oppositional argument in their forthcoming reply in support of their motion for summary judgment.

II. THE TURNBACK POLICY VIOLATES THE APA

A. The Turnback Policy and Turnbacks Are Final Agency Actions

Like the policies reviewed in *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 138-39 (D.D.C. 2018) and *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 174-77, 184-85 (D.D.C. 2015), the turnback policy is a final agency action reviewable under 5 U.S.C. § 706(2). *See* Dkt. 280 at 51-52. Defendants’ arguments to the contrary, which merely recycle their motion to dismiss briefing, fare no better this time.

Defendants attempt to conflate the turnback policy with programs found unreviewable in *Bark v. U.S. Forest Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014), *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 892-93 (1990), and *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 801 (9th Cir. 2013). But in those cases, plaintiffs challenged agencies’ general “continuing (and thus constantly changing) operations.” *Lujan*, 497 U.S. at 890; *see Bark*, 37 F. Supp. 3d at 50-51 (“generalized complaints about agency behavior”); *Wild Fish Conservancy*, 730 F.3d at 801 (challenging “day-to-day operations that merely implement operational plans”).

Here, by contrast, Plaintiffs “attack *particularized* agency action,” *R.I.L-R*, 80 F. Supp. 3d at 184—specifically, Defendants’ decisions to purposefully restrict access to the asylum process in violation of their statutory obligations. *See Ramirez v. ICE*, 310 F. Supp. 3d 7, 20-21 (D.D.C. 2018) (“aggregation of similar, discrete purported injuries—claims that many people were injured in similar ways by the same type of agency action” is not “a broad programmatic attack”); *see also Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 388 (D.C. Cir. 2018) (distinguishing *Lujan* where plaintiffs challenged “cabined and direct” “identified transgression” of statutes and regulations). Plaintiffs use the term “turnback policy” as shorthand to refer to the particularized agency action they challenge; Defendants need not refer to the policy with a succinct label in a formal policy document for it to be challengeable. *See R.I.L-R*, 80 F. Supp. 3d at 184 (noting that a policy of “consideration of an allegedly impermissible factor” is “*particularized* agency

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1 action,” without discussing whether ICE had a formal label for the policy).⁷

2 Defendants mistakenly suggest that Plaintiffs have “attach[ed] a policy label
3 to disparate agency practices or conduct.” CM at 32-33. Yet all the agency practices
4 enumerated by Defendants—including turnbacks of asylum seekers between May
5 and November 2016, returns of asylum seekers standing on U.S. soil in late 2017,
6 removal of seats at the Hidalgo POE to reduce processing capacity, and the issuance
7 of metering guidance and the prioritization-based queue management memorandum
8 in 2018—bolster the existence of the turnback policy. No part of this policy, which
9 originated in 2016, was memorialized in writing until 2018 because CBP believed
10 that [REDACTED] See Op. Br. at 12-13. Defendants’ intentional
11 decision [REDACTED] meant that before then,
12 CBP officers used a variety of tactics to turn back asylum seekers from POEs. See
13 *id.* at 5. Nonetheless, the result was the same: denial of access to the asylum process
14 for tens of thousands of asylum seekers.

15 Plaintiffs have presented overwhelming evidence of verbal, and later written,
16 directives from high-level CBP officials that officers at POEs should “return
17 individuals who enter the U.S. and request asylum back to Mexico without” being
18 processed, *see, e.g.*, Op. Br. at 19. CBP officers lied to asylum seekers about their
19 lack of capacity to inspect and process them. Op. Ex. 1 at 100:22-101:6; Op. Ex. 118
20 at 93:4-12; Op. Ex. 3 at 157:15-18. Incredibly, Defendants argue that neither first-
21 hand testimony by CBP officers concerning lies to asylum seekers at POEs, nor
22 internal CBP documents disclosing the use of coercive tactics, constitute evidence
23

24 ⁷ *Lightfoot v. District of Columbia* is inapposite. That case addressed class
25 certification under Fed. R. Civ. P. 23, not the APA “final agency action” standard.
26 In any event, it did not involve particularized agency action but instead an
27 “amorphous claim of systemic or widespread [government] misconduct,” and the
28 *Lightfoot* plaintiffs were seeking to aggregate claims that were not “susceptible to
class-wide treatment” and that required individualized relief. 273 F.R.D. 314, 324,
327, 330, 335 (D.D.C. 2011). Unlike *Lightfoot*, Plaintiffs seek class-wide injunctive
relief based on “questions of law applicable in the same manner to each member of
the class.” *Id.* at 324 (citation omitted); Dkt. 513 at 10-12.

1 of a border-wide policy. CM at 44. This “rogue officers” argument strains credulity.
2 Defendants standardized the turnback policy across all POEs out of a perceived
3 [REDACTED]
4 Op. Ex. 117. Given this standardization, Defendants have no explanation for why
5 conduct at multiple POEs is not indicative of a border-wide policy. Defendants’
6 turnback policy is precisely the type of final, particularized agency action
7 appropriate for APA review. *See* Op. Br. at 27-29.

8 Like the turnback policy, individual turnbacks are final agency actions and are
9 likewise amenable to APA review. First, each turnback “mark[s] the
10 ‘consummation’ of the agency’s decisionmaking process,” *see Bennett v. Spear*, 520
11 U.S. 154, 177-78 (1997), because it functionally denies individuals access to the
12 U.S. asylum process. *See Aguayo v. Jewell*, 827 F.3d 1213, 1223 (9th Cir. 2016)
13 (“denial” of relief and “failure to act” are “agency action” that can be “final” under
14 5 U.S.C. § 551(13)); *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084,
15 1094-95 (9th Cir. 2014) (considering the practical effect of agency action). CBP
16 officers may tell some asylum seekers to “wait,” but the practical and intended effect
17 is to deprive them of access to the asylum process. *See, e.g.,* Op. Ex. 2 at 132
18 (Defendants “lack[ed] candor to the public [by not] stating the true facts that [CBP
19 is] ... blocking asylum to persons and families in order to block the flow of asylum
20 applicants.”). Indeed, CBP officers do not tell asylum seekers to “wait,”
21 contemporaneous recordings show that they tell asylum seekers to “go back to
22 Mexico.” Op. Ex. 18 (audio recording of CBP officer telling asylum seeker to “go
23 back to Mexico” multiple times); Op. Ex. 17 at 308:4-8. After being turned back,
24 asylum seekers put their names on “waitlists” and attempt to find shelter in Mexican
25 border towns. *See* Op. Ex. 10 at 138:17 (“generally the migrants have returned to the
26 shelters”); Op. Ex. 17 at 292:2-11 (CBP generally does not process asylum seekers
27 who are not on a waitlist). Given the risks of living in Mexican border towns
28 (including physical violence and pursuit by persecutors) and the extraordinary delays

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1 in processing asylum seekers, there is no guarantee that individuals who have been
2 turned back will ever have an opportunity to access the U.S. asylum process. *See*
3 *Op. Br.* at 16-18, 31. Thus, being told to “wait” has no bearing on whether an asylum
4 seeker is permitted to present herself at a POE in a “future yet distinct administrative
5 process.” *Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586,
6 593 (9th Cir. 2008); *see also Hosseini v. Johnson*, 826 F.3d 354, 362 (6th Cir. 2016)
7 (an applicant’s ability to “reapply ... as often as he wants” does not make a denial
8 non-final). And each turnback reflects a “conscious” and “deliberate decision” to
9 limit access to the asylum process at POEs. *ONRC Action v. Bureau of Land Mgmt.*,
10 150 F.3d 1132, 1137 (9th Cir. 1998).

11 Second, each individual turnback constitutes agency action “by which rights
12 and obligations have been determined, or from which legal consequences will flow.”
13 *See Bennett*, 520 U.S. at 177-78. In examining finality, courts “focus on the practical
14 and legal effects of the agency action.” *Or. Natural Desert Ass’n v. U.S. Forest Serv.*,
15 465 F.3d 977, 982 (9th Cir. 2006). This Court has already held that those who are
16 “in the process of arriving in” the U.S. fall within the scope of 8 U.S.C. §1225(b)(1)
17 and are entitled to be processed for asylum. Dkt. 280 at 46; *Al Otro Lado*, 952 F.3d
18 at 1013 (this Court’s “linguistic and contextual analysis” “has considerable force”
19 and “is likely correct”). However, Defendants use turnbacks to deprive class
20 members of the right to seek asylum, in violation of the INA, which is a legal
21 consequence of each turnback. Even under Defendants’ erroneous interpretation of
22 § 1225, legal consequences flow from turnbacks. Their argument to the contrary is
23 internally contradictory. Defendants assert that individuals arriving in the U.S. have
24 no rights until they physically cross the border. The decision to prevent them from
25 doing so therefore determines the extent of their rights, under Defendants’ theory.
26 Defendants cannot have it both ways—they cannot argue both that asylum seekers
27 have no rights if they have not crossed the border *and* that their actions to prevent
28 asylum seekers from crossing the border have no legal consequences.

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1 Citing the case of Plaintiff Roberto Doe, Defendants disingenuously argue
2 that his denial of access to the U.S. asylum process was not a direct consequence of
3 CBP's action. CM at 36. Defendants should read Roberto Doe's declarations again.
4 Roberto Doe was turned back by CBP officers, which facilitated his detention by
5 Mexican officials, and was subsequently deported by the Mexican government. Dkt.
6 390-75 at ¶ 6; Dkt. 390-97 at ¶¶ 6-7. Defendants' argument that Roberto Doe was
7 not deprived of his rights under the INA when he was turned back by CBP is based
8 on their mistaken belief that his turnback somehow does not count.

9 **B. The Turnback Policy Violates Congress's Unambiguous Statutory**
10 **Scheme and Exceeds Defendants' Authority**

11 Defendants have no meaningful response to Plaintiffs' claim that the turnback
12 policy exceeds Defendants' statutory authority. They advocate a fundamentally
13 incorrect reading of their authorizing statutes and a shocking power grab by the
14 Executive Branch. Defendants assert that because they prefer the agency to function
15 with fewer asylum seekers being processed at POEs, that turning asylum seekers
16 away must be lawful—effectively conceding that they are substituting their view for
17 that of Congress. But the relevant statutes could not be clearer: Defendants must
18 inspect all arriving noncitizens and process those seeking asylum according to law.

19 The plain text of Defendants' authorizing statutes puts this matter to bed.
20 Congress delegated a number of functions to DHS and CBP. *See* 6 U.S.C. §
21 111(b)(1) (DHS's "primary mission" functions); 6 U.S.C. § 202 (DHS Secretary's
22 "border, maritime, and transportation responsibilities" functions); 6 U.S.C. § 211(c)
23 (CBP Commissioner's functions); 6 U.S.C. § 211(g)(3) (OFO duties at POEs). These
24 lists generally delegate authority—a far cry from a "detailed statutory scheme," CM
25 at 43; they also do not detail discrete, mandatory ministerial duties enforceable under
26 APA § 706(1). None of these lists specifically grant Defendants the power to refuse
27 to inspect any noncitizens arriving at POEs or to block asylum seekers from crossing
28 the international border to present themselves for inspection at POEs.

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1 In contrast, Congress specifically mandated that Defendants carry out the
2 ministerial duty to inspect all noncitizens arriving at POEs. 8 U.S.C. § 1225(a)(3).
3 The mandatory duty to inspect all arriving noncitizens exists in the context of a
4 statutory scheme by which noncitizens seeking asylum may do so at POEs in
5 accordance with established procedures; in order to access that process, the first step
6 is inspection. *See id.* § 1225(a), (b). The duty to inspect is simply incompatible with
7 the unwritten power the agency asserts here: to refuse to inspect arriving asylum
8 seekers and to block their passage to POEs. *See* Op. Br. at 25; *RadLAX Gateway*
9 *Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (applying the
10 “commonplace of statutory construction that the specific governs the general”).

11 Defendants’ argument that in 6 U.S.C. § 111(b)(1) Congress “elevated DHS’s
12 national security functions over all others, including processing undocumented
13 migrants,” is untrue. CM at 43. That subsection lists eight items that together
14 constitute DHS’s “primary mission”; it does not state that item (A), “prevent[ing]
15 terrorist attacks within the United States,” is *more* primary than items (B) through
16 (H). *See* 6 U.S.C. § 111. To the contrary, the same subsection states that “carry[ing]
17 out all functions of entities transferred to [DHS],” § 111(b)(1)(D), including
18 inspections at POEs, is *equally* a part of DHS’s “primary mission,” as is “ensur[ing]
19 that the functions of the agencies and subdivisions within [DHS] that are not related
20 directly to securing the homeland are not diminished or neglected except by a
21 specific explicit Act of Congress,” § 111(b)(1)(E). And Defendants cite no Act of
22 Congress that authorizes a diminishment or neglect of the duty to inspect arriving
23 noncitizens at POEs for any reason, much less Defendants’ decision to re-prioritize
24 their missions. Defendants’ decision to prioritize other missions by limiting the
25 number of inspections of asylum seekers is invalid as a matter of law and not
26 authorized by statute.

27 None of Defendants’ case law compels a different result. *Massachusetts v.*
28 *EPA*, 549 U.S. 497 (2007), is inapplicable because Defendants have no statutory

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1 authority to turn away asylum seekers. That case counsels that courts should defer
2 when an agency decides not to engage in enforcement or, to a lesser extent,
3 rulemaking activities. *Id.* at 527. It says nothing about an agency’s power to
4 circumvent a mandatory duty and thereby undermine a statutory scheme. *See id.* And
5 it should go without saying that discretion not to make a rule does not also
6 encompass discretion to forgo a ministerial duty. *Compassion Over Killing v. FDA*,
7 849 F.3d 849 (9th Cir. 2017) is similarly irrelevant to this case. *Compassion* merely
8 outlines agency discretion to use case-by-case rulemaking rather than promulgating
9 regulations. *Id.* at 857. Finally, Defendants cite *Hernandez v. Mesa* for the
10 unremarkable proposition that controlling the movement of people and goods across
11 the border “implicates an element of national security.” 140 S. Ct. 735, 746 (2020).

12 Defendants are left to argue that turning asylum seekers away is a better policy
13 outcome, and therefore they should be allowed to do it. CM at 42-43. Between the
14 lines, Defendants effectively concede that as a policy, turnbacks are useful to them
15 because they lower the number of asylum seekers who are inspected at POEs relative
16 to what the number would otherwise be. But Defendants are not legislators. They do
17 not get to amend the INA or the HSA to suit their needs. *Supra* at 3-4. Congress gave
18 them no discretion to do so. *Supra* at 3-4. Defendants’ arguments about purported
19 necessity are irrelevant. They have improperly substituted their judgment for
20 Congress’s. *Burrage*, 571 U.S. at 218; *EBSC*, 932 F.3d at 774.

21 **C. The Turnback Policy is Arbitrary and Capricious**

22 The turnback policy is also arbitrary and capricious. First, the turnback policy
23 is inconsistent with congressional intent. *See EBSC v. Trump*, 950 F.3d 1242, 1273
24 (9th Cir. 2020) (agency interpretation that “is inconsistent with clearly expressed
25 congressional intent” is arbitrary and capricious). As Plaintiffs explain above, the
26 INA requires Defendants to inspect and process asylum seekers who are in the
27 process of arriving in the U.S. *Supra* at 8. Inspecting and processing asylum seekers
28 is a part of Defendants’ “primary mission” that cannot be “neglected or diminished”

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1 except by an explicit and specific Act of Congress. *See supra* at 1-4.

2 Second, Defendants' stated reason for adopting the turnback policy was a
3 "factor[] which Congress has not intended [them] to consider." *San Luis & Delta-*
4 *Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). As Defendants
5 admit, they diminished inspection and processing of arriving asylum seekers by
6 turning them back to Mexico to alleviate "capacity" constraints *in order to focus on*
7 *other missions*. *See* CM at 25-31. But Congress never gave Defendants authority to
8 reprioritize their various primary mission sets. *Supra* at 1-4. In fact, it said the
9 opposite. *Supra* at 1-4. Defendants' asserted reason for adopting the turnback policy
10 is therefore arbitrary and capricious. *Locke*, 776 F.3d at 994.

11 Finally, if the Court wants to go beyond the clear language of the INA and
12 HSA, Plaintiffs have submitted substantial evidence, including direct testimony
13 from a whistleblower, that the turnback policy is based on a pretext. *See Saget v.*
14 *Trump*, 375 F. Supp. 3d 280, 361 (E.D.N.Y. 2019) ("[A]gency[] actions are arbitrary
15 and capricious under the APA if they are pretextual."). Specifically, that Defendants'
16 "capacity" excuse is a lie. *See* Op. Ex. 1 at 100:22-101:6; Op. Ex. 118 at 93:4-12;
17 Op. Ex. 3 at 157:15-18. This evidence shows that the turnback policy is actually a
18 deterrence policy. And, contrary to Defendants' position (CM at 52-53), because
19 inspecting and processing asylum seekers in the process of arriving in the U.S. is a
20 "primary mission" that cannot be "diminish[ed] or neglect[ed]" except as authorized
21 by an explicit and specific Act of Congress, "there is no room for deterrence under
22 the scheme that Congress has enacted." Dkt. 280 at 65.

23 Defendants' attempt to dispute the mountain of pretextual evidence runs head-
24 long into the undisputed record. **First**, Plaintiffs presented the testimony of a
25 whistleblower who testified that he was instructed to lie when turning asylum
26 seekers back to Mexico, Op. Ex. 1 at 99:25-100:2, and that "it was obvious to
27 everybody that was implementing [the turnback] policy" that the "capacity excuse
28 was a lie." *Id.* at 100:25-101:6. Defendants attempt to dismiss this testimony as

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1 coming from merely “a single first-line officer” that is “probative only of what the
 2 officer believed occurred” at his POE. CM at 47. But Defendants *cite nothing* to
 3 support their argument. *See id.* For example, they do not claim that officers
 4 elsewhere were not instructed to lie. *See id.* And there is evidence elsewhere in the
 5 record that CBP officers at other POEs *were* acting dishonestly. *See* Op. Ex. 2 (CBP
 6 “lacks candor to the public in stating the true facts that the [a]gency intentionally . . .
 7 block[ed] asylum to persons and families in order to block the flow of asylum
 8 applicants” and to create a “chilling [e]ffect[] to all others attempting entry into the
 9 United States.”); Op. Ex. 3 at 157:15-18 [REDACTED]
 10 [REDACTED]; Op. Ex. 118 at 93:4-12 (CBP officers told
 11 asylum seekers that a POE was “at capacity,” but never checked to see if that was
 12 true); Op. Ex. 117 [REDACTED].
 13 Defendants cannot rely on mere attorney argument in hopes of avoiding this
 14 damning testimony. *Gilmore v. Wells Fargo Bank N.A.*, 2014 U.S. Dist. LEXIS
 15 104219, at *11 (N.D. Cal. 2014) (“Attorney argument is not evidence.”).⁸

16 **Second**, Defendants claim that a DHS Rule 30(b)(6) witness, Joseph Eaton,
 17 never said that CBP officers “were telling travelers that the [Otay Mesa] facility was
 18 at capacity but weren’t actually checking on the capacity of the facility.” CM at 47-
 19 48. To be clear, here is the testimony that is in the record:

20 Q. So these conclusions indicate that officers at Otay Mesa were
 21 telling travelers that the facility was at capacity but weren’t
 22 actually checking on the capacity of the facility; correct?

23 A. That’s how I read it, yes.

24 Op. Ex. 118 at 93:4-12 (objection omitted).⁹

25 ⁸ Defendants claim that the whistleblower “supports” their arguments, citing his
 26 testimony that the Tecate POE might “back up” if it did not turn asylum seekers back
 27 to Mexico. CM at 47. But the whistleblower clarified that his testimony on that point
 28 was a “guess.” Op. Ex. 1 at 146:19-25.

⁹ Defendants’ claim that this was a leading question is a red herring. CM at 47. Mr.
 Eaton was a Rule 30(b)(6) witness for a party opponent. Fed. R. Evid. 611(c)(2).

1 **Third**, Defendants argue that David Atkinson’s testimony concerning seats
 2 being removed from the Hidalgo POE is inadmissible because he lacked foundation
 3 to testify about the issue. CM at 48. But Defendants’ argument is misleading.
 4 Defendants *never objected* to the question at issue for any reason, including lack of
 5 foundation. Op. Ex. 3 at 157:14-18. Since Defendants did not raise an objection at
 6 the time the question was posed, that objection is waived. Fed. R. Civ. P. 30(c)(2).

7 **Fourth**, Defendants’ assertion that asylum seekers were turned back solely
 8 due to operational exigencies is not true. For instance, Defendants’ lead declarant
 9 Beverly Good claims that the turnback policy was just the result of increased
 10 numbers of asylum seekers coming to POEs. *See* Def. Ex. 1 at ¶ 21. But in November
 11 2016, she emphasized to Todd Owen, the senior-most official at OFO, that in the
 12 Laredo Field Office, [REDACTED] Rep. Ex. 1 at
 13 389. Ms. Good does not attempt to explain this statement anywhere in her 16-page
 14 declaration.

15 And with good reason. The record is filled with evidence that Defendants
 16 adopted the turnback policy to deter asylum seekers. For example, Defendants cite
 17 Todd Owen’s self-serving statement that the turnback policy was not “designed to
 18 deter migrants from entering the U.S.” Op. Ex. 10 at 70:1-5. But Mr. Owen [REDACTED]
 19 [REDACTED]
 20 [REDACTED] Op. Ex. 97. He
 21 explained that the policy would result in [REDACTED]
 22 [REDACTED]
 23 [REDACTED] Op. Ex. 96. With knowledge of that likely consequence, Secretary
 24 Nielsen issued the prioritization-based queue management memorandum. *See* Op.
 25 Ex. 98. Then, CBP officers [REDACTED]
 26 [REDACTED] Op. Ex. 107.
 27 Defendants claim that Secretary Nielsen was just “[r]equesting information about
 28 the potential costs and impacts of implementing a policy.” CM at 49. That is

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1 ridiculous. Secretary Nielsen was briefed about the fact that a contemplated policy
 2 would result in [REDACTED] *then she*
 3 *adopted the policy*, and then *CBP followed up* [REDACTED]
 4 [REDACTED] Op. Exs. 96, 97, 98, 107.¹⁰

5 *Fifth*, Defendants say that turnbacks “for the most part” stopped in January
 6 2017. *See* CM at 3. The record says otherwise. [REDACTED]
 7 [REDACTED] in January 2017 in order to effect a turnback.
 8 CM at 20 n.1. [REDACTED]
 9 [REDACTED] *Id.* And the record is replete with evidence that turnbacks occurred in
 10 2017. *See* Op. Ex. 17; CM at 21 n.2; Op. Ex. 7 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]; Op. Ex. 19 at 1, 5 (DHS Office of Inspector General report
 13 explaining that Tecate POE had been turning back asylum seekers “[s]ince 2016”
 14 with no mention of stopping in 2017 and identified turnbacks that occurred in
 15 February 2017); Rep. Ex. 2 at 724 (turnback in January 2017); Rep. Ex. 3 at 779
 16 (same); Rep. Ex. 4 at 822 (April 2017). Defendants’ claims are belied by the record.

17 *Sixth*, citing no evidence, Defendants claim that they could not use parole to
 18 respond to surges in immigration. CM at 49. Here’s what Exhibit 62 to their brief
 19 says about the Haitian “surge” in 2016: “The majority of the arriving Haitian
 20 nationals are processed under [8 U.S.C. § 1229a] removal proceedings, in lieu of
 21 expedited removal under [8 U.S.C. § 1225]. This action circumvents mandatory
 22 detention provisions under [§ 1225] and allows [ICE] to parole the aliens, utilizing
 23 existing alternatives to detention.” Def. Ex. 62 at 712. Defendants cannot defeat
 24 summary judgment with arguments that are contradicted by their own exhibits. *See*

25
 26 ¹⁰ Even if the Court were to ignore Secretary Nielsen’s actions, Defendants’
 27 operational exigency argument is undermined by the record. Defendants’
 28 contemporaneous reports show that, even in the rare instances where POEs were
 operating above 100% capacity, the number of asylum seekers [REDACTED]. *See* Op. Exs. 21-25; Op. Ex. 20 at ¶¶ 23, 88-91.

1 *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002).

2 **Seventh**, Defendants argue that they did not actually shift from using
3 detention capacity to operational capacity as the metric for determining the capacity
4 of a POE to temporarily detain asylum seekers and had “long” used operational
5 capacity as the measure. CM at 49-50. The record disagrees. Emails show that in
6 early June 2018 OFO [REDACTED]
7 Rep. Ex. 5 at 915. Witnesses testified that this shift occurred in June 2018. Op. Ex.
8 100 at 78:18-25; Op. Ex. 14 at 137:25-138:12.

9 The evidence Defendants cite does not contradict this record. The mere fact
10 that an email used the phrase “operational capacity” prior to June 2018 does not
11 mean that Defendants were using operational capacity as a metric justifying turning
12 back asylum seekers. *See* Def Ex. 62 at 712. While Mariza Marin testified “we have
13 always used operational capacity,” Op. Ex. 17 at 70:12-13, she could not point to a
14 scintilla of evidence that supported her story. *Id.* at 95:16-108:3. And, despite
15 claiming that she “always used” operational capacity, when Ms. Marin wrote [REDACTED]
16 [REDACTED]
17 **she did not use the phrase “operational capacity” once.** *Id.* at 95:16-97:11, 102:13-
18 108:3. There is no genuine dispute that Defendants shifted from using detention
19 capacity to using operational capacity in June 2018.

20 **Eighth**, Defendants claim that they implemented “contingency plans,” CM at
21 49, but “those efforts were insufficient to prevent overcrowding.” *Id.* This argument
22 is a non sequitur. The contingency plans exist to address periods when a POE is
23 experiencing an influx of migrants. *See, e.g.*, Op. Ex. 28 at 261 (policy [REDACTED]
24 [REDACTED]); Op. Ex. 30 at 011 (policy designed to address
25 [REDACTED]). Complaining that there was overcrowding when a contingency
26 plan is activated is like complaining about getting wet when standing in the rain.

27 **Ninth**, Defendants claim that their “prioritization regime” was “successful”
28 because the number of credible fear interviews increased in 2018 and 2019. CM at

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4. This statistic is misleading. Since CBP can either refer arriving asylum seekers for credible fear interviews under § 1225 or place them directly into removal proceedings under 8 U.S.C. § 1229a, *see* Def. Ex. 62 at 712, increased credible fear referrals does not necessarily mean CBP inspected more arriving asylum seekers. It may simply mean that CBP chose to refer a higher percentage of arriving asylum seekers for a credible fear interview. Beyond that, even if the number of asylum seekers referred for credible-fear interviews increased by 108%, as Defendants claim, the number of asylum seekers forced to wait in Mexican border towns due to the turnback policy increased **327%** from 2018 to 2019. The increases in some border cities were considerably higher.

Mexican Border City	December 2018 ¹¹	August 2019 ¹²	Increase
Tijuana	5,000	10,000	100%
Mexicali	350	2,000	471%
San Luis Rio Colorado	0	1,050	N/A
Nogales	170	680	300%
Ciudad Juarez	170	5,645	3,220%
Ciudad Acuna	0	303	N/A
Piedras Negras	0	1,000	N/A
Nuevo Laredo	80	1,000	1150%
Reynosa	0	3,600	N/A
Matamoros	283	600	112%
Total	6,053	25,878	327%

Even if the percentage of asylum seekers processed at POEs increased, the percentage of asylum seekers that Defendants turned back increased *more*.

¹¹ Rep. Ex. 6 at 7.

¹² Rep. Ex. 7 at 4-13.

1 Defendants' turnback policy was only a "success" with respect to turning back
2 asylum seekers and breaking the law.

3 **Finally**, citing misleading statistics regarding asylum seeker processing,
4 Defendants argue that there were no arbitrary caps on processing asylum seekers.
5 But Defendants do nothing to suggest that their contemporaneous emails referencing
6 arbitrary caps are inaccurate. *See, e.g.*, Op. Ex. 12 at 742 (San Ysidro POE had a
7 [REDACTED]); Op. Ex. 104 ([REDACTED]);
8 [REDACTED]; Op. Ex. 105 (CBP sent
9 guidance about [REDACTED]). And the mere fact
10 that a number of asylum seekers were inspected and processed does not mean that
11 the number of asylum seekers processed and inspected would not have been higher
12 but for the turnback policy. Instituting such caps is wholly inconsistent with
13 Defendants' duty to inspect and process all noncitizens arriving at POEs.

14 **D. This Court Has Already Rejected Defendants § 706(1) Arguments**

15 Defendants continue to argue that they can withhold their mandatory duties of
16 inspection and referral from asylum seekers who have not yet set foot across the
17 physical border (because Defendants will not let them cross). CM at 37-39.
18 According to Defendants, they can decide who is permitted to cross the border and
19 thus to whom they owe the mandatory duties Congress imposed. *See id.* This Court
20 has already rejected these arguments multiple times and held that Defendants do, in
21 fact, owe mandatory inspection and referral duties to asylum seekers "who are in the
22 process of arriving in the United States," including those not yet on U.S. soil. Dkt.
23 280 at 46; *see also* Dkt. 330 at 31 (similar). The Court should do so again here.
24 Defendants add nothing to their previous arguments that would alter the Court's
25 "sound and persuasive" analysis on this issue. *Al Otro Lado*, 952 F.3d at 1011-12.¹³

26
27 ¹³ Defendants' attempt to minimize the testimony of CBP's 30(b)(6) witness
28 notwithstanding, *see* CM at 40 n.7, CBP's testimony establishes that the *agency*
itself, not just its officers, views noncitizens seeking asylum who are turned back at

1 Defendants' first three points arguing against this Court's previous holdings
 2 concerning the meaning of 8 U.S.C. §§ 1158 and 1225, CM at 37-38, which touch
 3 on verb tense,¹⁴ the definition of "arrive," and the presumption against
 4 extraterritoriality, have already been rejected by this Court.¹⁵ Dkt. 280 at 35-47.

5 Defendants' fourth and fifth points about the structure of the INA and the
 6 "overall statutory scheme" are equally unavailing. CM at 38. Defendants refer to an
 7 observation in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993), that
 8 deportation and exclusion proceedings do not occur outside the U.S., and to two
 9 other cases discussing the significance of a noncitizen's entry into or "land[ing]" in
 10 the U.S. (not arrival at a POE), and make reference to § 1225(b)(1)(A)(i), which is
 11 not part of any of Plaintiffs' claims. CM at 38. None of these citations address the
 12 import of the statutory provisions at issue here: § 1158(a)(1) or § 1225(a)(1), (a)(3),
 13 and (b)(1)(A)(ii). These provisions establish a series of procedures by which
 14 noncitizens seeking asylum may do so at POEs. The first step in this procedural
 15 structure is inspection, which governs access to the remainder of the process.

16 If anything, the overall statutory scheme protects asylum seekers and does not
 17 allow Defendants to discriminate among arriving noncitizens, instead requiring
 18 Defendants to inspect and process them all. *See supra* 1-4.

19 Defendants' final point, on the legislative history of § 1225, is unconvincing
 20 for two reasons. First, they quote a report on H.R. 2202, the Immigration in the
 21 National Interest Act of 1995 (later renamed the Immigration Control and Financial

22
 23 the border as "attempting" to come into the United States at a POE. *See* Op. Ex. 17
 24 at 197:21-202:3; *see also* 8 C.F.R. § 1.2 (defining "arriving alien" as "an applicant
 for admission . . . attempting to come into the [U.S.] at a [POE]").

25 ¹⁴ Defendants' citation to *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020), *see*
 26 CM at 37-38, adds nothing to the Court's existing statutory interpretation of the
 relevant INA sections. The quoted fragment from *Thuraissigiam* has nothing to do
 with the meaning of the present-tense use of "arrives" in §§ 1158 or 1225.

27 ¹⁵ This Court has also rejected Defendants' argument about the use of the present
 28 progressive tense ("arriving in"). *See* CM at 38 n.6; Dkt. 280 at 38-39, 46-47.

1 Responsibility Act of 1996), which *never became law*. See H.R. Rep. No. 104-469,
 2 pt. 1, at 1 (noting bill number); Immigration Control and Financial Responsibility
 3 Act of 1996, H.R. 2202, 104th Cong. (1995). Second, the section of the bill they
 4 quote discusses a proposed 30-day deadline to file an affirmative asylum application,
 5 which never became law and is wholly distinct from the government’s duty to
 6 provide access to the asylum process at POEs.¹⁶

7 In addition to arguing against this Court’s prior statutory analysis, Defendants
 8 argue that Plaintiffs’ § 706(1) claim should fail because CBP continues to process
 9 *some* asylum seekers, notwithstanding the turnback policy.¹⁷ But, the fact that some
 10 number of asylum seekers were eventually inspected at POEs and referred for
 11 interviews does not establish that they were not initially turned back or metered.
 12 Every turnback is a § 706(1) violation in the moment it occurs because it is
 13 mandatory “agency action unlawfully withheld,” and the undisputed facts show that
 14 turnbacks occurred. See Op. Br. at 22-23. Second, Defendants argue that there can
 15 be no “categorical” turnback policy if at least *some* asylum seekers were inspected
 16 and processed. CM at 39-40. But, as this Court already explained, “Plaintiffs . . . do
 17 not claim that the Turnback Policy is a policy to categorically deny asylum seekers
 18 entry into the United States. Instead, Plaintiffs have demonstrated this is a policy
 19 aimed at deterring or limiting asylum seekers from seeking asylum in the United
 20 States.” Dkt. 280, at 53. Even if credible fear referrals occurred, there is no genuine

21
 22 ¹⁶ Defendants make the mistake of conflating access to the asylum process with a
 23 specific step in the process—the determination of inadmissibility necessary to
 24 proceed to the referral mandate in § 1225(b)(1)(A)(ii). See CM at 38 n.6. The same
 25 footnote also runs directly counter to controlling case law, in particular the Ninth
 26 Circuit’s holding that “physical presence” is not a term of art, *Barrios v. Holder*, 581
 F.3d 849, 863 (9th Cir. 2009), *abrogated on other grounds by Hernandez-Rivas v.*
Holder, 707 F. 3d 1081, 1093 (9th Cir. 2013), and thus cannot be read as applying
 only to noncitizens who have effectuated an “entry.”

27 ¹⁷ Defendants argue that this demonstrates that there is no overarching agency policy
 28 to withhold mandatory action required under the INA. But the existence of an
 overarching agency policy goes only to Plaintiffs’ § 706(2) claims.

1 dispute that the turnback policy “deter[ed] or limit[ed]” class members from
 2 seeking asylum in the U.S., which is the core of Plaintiffs’ claims. *Id.*¹⁸

3 Plaintiffs, not Defendants, are entitled to summary judgment on their APA
 4 claims.

5 **III. THE TURNBACK POLICY IS UNCONSTITUTIONAL**

6 Defendants concede up front that, at a minimum, Plaintiffs’ constitutional due
 7 process rights are coextensive with their statutory rights. As Plaintiffs have
 8 demonstrated, *see supra* 1-4; Op. Br. at 21-25, the turnback policy denies class
 9 members statutorily guaranteed procedures governing the inspection of asylum
 10 seekers. Thereby, Defendants deny class members due process of law.

11 Defendants claim that class members cannot invoke constitutional procedural
 12 protections at the border. CM at 54. But this Court has already recognized that there
 13 is nothing “‘impracticable [or] anomalous’ in applying elementary due process
 14 protection at the U.S. border.” Dkt. 280 at 74 (quotation omitted). This is especially
 15 so where “the practical necessities” warrant application of the Due Process Clause.
 16 *Id.* at 76. Summary judgment for Plaintiffs is warranted on this ground as well.

17 **IV. THE TURNBACK POLICY VIOLATES THE ATS**

18 Seemingly ignoring the wealth of authority Plaintiffs marshal in support of
 19 their ATS claim, Defendants accuse Plaintiffs of failing to demonstrate why this
 20 Court should “fashion [such] a cause of action” under the ATS for violations of the
 21 duty of *non-refoulement*. CM at 55. Defendants’ ATS arguments all miss the mark.

22 First, Defendants correctly identify the *Sosa* standard—*i.e.*, that to be
 23 cognizable under the ATS, a norm must be “specific, universal and obligatory,” *Sosa*
 24 *v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)—but do nothing to contest the fact
 25 that the duty of *non-refoulement* has reached that *jus cogens* status, *see* Op. Br. at

26
 27 ¹⁸ Defendants oppose Plaintiffs’ motion for summary judgment under § 706(1) by
 28 citing the factors analyzed in *Telecomms. Research & Action Ctr. v. FCC* (“*TRAC*”),
 750 F.2d 70, 80 (D.C. Cir. 1984). CM at 40. Plaintiffs will address the *TRAC* factors in
 their forthcoming reply in support of their motion for summary judgment.

33. Through the ATS, Congress conferred on federal courts the power to “recognize private causes of action” involving serious violations of the law of nations. *Sosa*, 542 U.S. at 724. *Non-refoulement* is just such a violation, as evidenced by the consensus of international law opinion and jurisprudence. Despite Defendants’ assertion, it is no valid objection that this duty was not part of “the law of nations” as it existed in 1789. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (“the First Congress did not intend the provision to be ‘stillborn’”).

Second, Defendants incorrectly assert that *non-refoulement*-type claims are actionable only in removal proceedings because the U.S. incorporated the norm into domestic law through the withholding of removal statute. CM at 55. Not so.¹⁹ The norms cognizable under the ATS routinely mirror domestic law enactments, as one would expect from a statute that is designed to make violations of “universal” legal norms actionable. For example, both the ATS on the one hand and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, and 18 U.S.C. § 2340A, on the other hand, reflect the *jus cogens* norm prohibiting torture; yet courts do not hold that the domestic implementation of a parallel norm defeats ATS jurisdiction. *See Sosa* 542 U.S. at 713, 731; S. Rep. No. 102-249, at 5 (1991) (explaining the TVPA is designed to “enhance the remedy already available under” the ATS by “extend[ing] a civil remedy also to U.S. citizens who may have been tortured abroad”); *see also Al Shimari v. CACI Premier Tech., Inc.*, 263 F. Supp. 3d 595

¹⁹ This Court should reject Defendants’ reliance on *Stevic* for the proposition that the *non-refoulement* obligation is not “available to aliens at the border.” CM at 57. The citation to *Stevic* reflects only that the 1952 withholding of removal statute did not apply to those seeking “admission.” *INS v. Stevic*, 467 U.S. 407, 421 (1984). Importantly, the “prevailing international interpretation” of *non-refoulement* states that the principle applies not only to those individuals who are admitted within a country’s borders, but to those at the border as well. Mark Gibney, *Refugees*, 4 ENCYCLOPEDIA OF HUMAN RIGHTS 315, 318 (Oxford University Press, 2009). *See also Amuur v. France*, App. No. 19776/92, ¶ 52 (Eur. Ct. H.R. June 25, 1996) (“Where a State is deemed to have control, it may only return an asylum seeker to another country if that country will also abide by the principle of nonrefoulement and allow the individual to seek asylum in accordance with international law.”); Alice Edwards, *Human Rights, Refugees, and the Right to Enjoy Asylum*, 17 INT’L J. REFUGEE L. 293, 301 (“[W]ithout appropriate asylum procedures, obligations of *non-refoulement*, including rejection at the frontier, could be infringed”).

(E.D. Va. 2017) (finding ATS jurisdiction over claims grounded in international law prohibitions on torture despite congressional enactments also prohibiting torture). That Congress amended the INA to “conform[] it to the language of Article 33 of the United Nations Protocol,” *Stevic*, 467 U.S. at 421, counsels in *favor* of ATS recognition. *Sosa*, 542 U.S. at 725-26 (conferral of ATS jurisdiction is strengthened by looking “for legislative guidance”).

Third, Defendants’ analogy to *Bivens* is particularly misplaced. *Bivens* is fundamentally distinct from the ATS: judicial skepticism of new *Bivens* claims derives from its status as a *wholly* judicially created cause of action. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1848 (2017). By contrast, Congress created the ATS, delegating to courts authority to recognize certain common law causes of action. *Sosa*, 542 U.S. at 732. No court has held that the “judicial caution” already built into the *Sosa* inquiry is remotely similar to the *Bivens* test’s “special factors [that] counse[l] hesitation.” *See Al Shimari v. CACI Premier Tech., Inc.*, 320 F. Supp. 3d 781, 783-85 (E.D. Va. 2018) (rejecting *Bivens*-type limitations on ATS).

Finally, Defendants invoke *Hernandez v. Mesa*, 140 S. Ct. 735 (2020)—a case that turns on *Bivens* “special factors” not material here—for the proposition that the U.S. government merits special protection and deference at the border. CM 56. But the mere incantation of “national security,” “foreign relations,” and “border security” cannot defeat application of the ATS. *Ziglar*, 137 S. Ct. at 1862 (invocation of “national-security concerns” cannot be a “talismán used to ward off inconvenient claims”). Courts have enforced the ATS in contexts far more connected with bona fide national security concerns than Defendants claim here. *See Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528-29 (4th Cir. 2014) (upholding ATS jurisdiction over claims arising out of abuse of detainees held by U.S. military in Abu Ghraib prison). Indeed, as the Supreme Court emphasizes, the primary objective of the ATS is “to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations.” *Jesner v. Arab Bank*,

OPP’N TO DEFS’ CROSS-MOTION FOR S.J.

1 *PLC*, 138 S. Ct. 1386, 1406 (2018). That is no less true when the violations are
 2 committed by the U.S. government and is precisely why an ATS cause of action
 3 exists here. Defendants cannot simply send back asylum seekers *en masse* to another
 4 country in flagrant disregard for the norm of *non-refoulement*, and they must be held
 5 accountable for their repeated violations of international law.

6 **V. PLAINTIFFS’ STAND-ALONE INA CLAIM IS VALID**

7 Defendants argue that the Court should grant summary judgment in their favor
 8 on Plaintiffs’ standalone INA claim because Plaintiffs supposedly “lack a private
 9 right of action under the INA.” CM at 31-32. But Defendants are wrong that the INA
 10 can be enforced only through the APA or the grant of an explicit cause of action in
 11 the INA itself.²⁰ The Ninth Circuit recently recognized a court’s inherent power—
 12 independent of the APA—to constrain executive violations of law, explaining:
 13 “[e]quitable actions to enjoin *ultra vires* official conduct do not depend upon the
 14 availability of a statutory cause of action; instead they seek a ‘judge-made remedy’
 15 for injuries stemming from unauthorized government conduct, and they rest on the
 16 historic availability of equitable review.” *Sierra Club v. Trump*, 963 F.3d 874, 890-
 17 91 (9th Cir. 2020) (citation omitted). Like the *Sierra Club* plaintiffs, Plaintiffs claim
 18 that Defendants lack statutory authority to turn back asylum seekers at POEs; and
 19 just as Plaintiffs’ due process claim may proceed separately from the APA’s
 20 strictures under nonstatutory review, so too may their *ultra vires* claim. *Id.* at 891.

21 Defendants’ reliance on *Ms. L v. ICE* is misguided. The portion of the case
 22 they cite relies on § 1158(d)(7), in which Congress *explicitly* precluded private
 23 enforcement of a short list of procedures found in § 1158(d) related to the filing of
 24 asylum applications, and not access to the asylum process itself. 302 F. Supp. 3d
 25

26 ²⁰ Defendants would have the Court believe that it already decided this question in
 27 Defendants’ favor. *See* CM at 31-32. Not so. As this Court explained, “its prior
 28 statement regarding the scope of judicial review flowed from the nature of the
 parties’ prior dismissal briefing,” which was “limited . . . to the sufficiency of
 Plaintiffs’ APA claims” as pled in the original complaint. Dkt. 280 at 67.

1 1149, 1168 (S.D. Cal. 2018); *see* § 1158(d)(7) (“Nothing *in this subsection* shall be
 2 construed to [create an enforceable right or benefit.]”) (emphasis added); *Keene*
 3 *Corp. v. United States*, 508 U.S. 200, 208 (1993) (“Where Congress includes
 4 particular language in one section of a statute but omits it in another . . . , it is
 5 generally presumed that Congress acts intentionally and purposely in the disparate
 6 inclusion or exclusion.”). Here, Plaintiffs do not seek enforcement of the procedures
 7 in § 1158(d), and *Ms. L v. ICE* does not limit nonstatutory review of the INA
 8 provisions actually at issue in this case. *See* 302 F. Supp. 3d at 1168. Defendants’
 9 only other cited case, *New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1166
 10 (D.N.M. 2020), involved only APA and constitutional claims, so the court’s offhand
 11 remark about a private right of action under “the INA” as a whole was dicta, not a
 12 holding, and is neither binding nor persuasive. *Id.*; *see also* Complaint at ¶¶ 40-62,
 13 *New Mexico v. McAleenan*, 19-cv-00534 (D.N.M. June 10, 2019) (Dkt. 1) (not
 14 asserting a private right of action under the INA).

15 Defendants’ arguments on the INA provide no basis for summary judgment.

16 VI. CONCLUSION

17 For the foregoing reasons, Plaintiffs are entitled to summary judgment.

18 Dated: October 16, 2020

MAYER BROWN LLP
 Matthew H. Marmolejo
 Ori Lev
 Stephen M. Medlock

SOUTHERN POVERTY LAW
 CENTER
 Melissa Crow
 Sarah Rich
 Rebecca Cassler

CENTER FOR CONSTITUTIONAL
 RIGHTS
 Baher Azmy
 Ghita Schwarz
 Angelo Guisado

OPP’N TO DEFS’ CROSS-MOTION FOR S.J.

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AMERICAN IMMIGRATION
COUNCIL

Karolina Walters

By: /s/ Stephen M. Medlock
Stephen M. Medlock

Attorneys for Plaintiffs

OPP'N TO DEFS' CROSS-MOTION FOR S.J.

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all counsel via the Court's CM/ECF system.

Dated: October 16, 2020

MAYER BROWN LLP

By /s/ Stephen M. Medlock

OPP'N TO DEFS' CROSS-MOTION FOR S.J.

1 JEFFREY BOSSERT CLARK
2 Acting Assistant Attorney General
3 Civil Division
4 WILLIAM C. PEACHEY
5 Director, Office of Immigration Litigation –
6 District Court Section
7 KATHERINE J. SHINNERS (DC 978141)
8 Senior Litigation Counsel
9 ALEXANDER J. HALASKA (IL 6327002)
10 Trial Attorney
11 United States Department of Justice
12 Civil Division
13 Office of Immigration Litigation
14 P.O. Box 868, Ben Franklin Station
15 Washington, D.C. 20044
16 Tel: (202) 307-8704 | Fax: (202) 305-7000
17 alexander.j.halaska@usdoj.gov

18 *Counsel for Defendants*

19
20
21
22
23
24
25
26
27
28
**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(San Diego)**

AL OTRO LADO, Inc., *et al.*,

Plaintiffs,

v.

CHAD F. WOLF, Acting Secretary of
Homeland Security, *et al.*, in their
official capacities,

Defendants.

Case No. 3:17-cv-02366-BAS-KSC

Hon. Cynthia A. Bashant

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

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INTRODUCTION

“The United States’ border with Mexico extends for 1,900 miles, and every day thousands of persons and a large volume of goods enter this country at ports of entry on the southern border.” *Hernandez v. Mesa*, 140 S. Ct. 735, 746 (2020). “One of the ways in which the Executive protects this country is by attempting to control the movement of people and goods across the border, and that is a daunting task.” *Id.* This case is about whether U.S. Customs and Border Protection (CBP) can control the flow of undocumented aliens into the ports of entry to help accomplish that daunting task.

“[T]he inspection, processing, and admission” of aliens is one of CBP’s functions, 6 U.S.C. § 211(c), but it is not the government’s primary function at the ports of entry. Congress tasked CBP’s Office of Field Operations (OFO), the component that operates the ports, with deterring and preventing terrorists, weapons, illegal entrants, illicit drugs, agricultural pests, and contraband from entering the United States through the ports and “facilitat[ing] and expedit[ing] the flow of legitimate travelers and trade.” *Id.* § 211(g)(3). Congress directed the Secretary of Homeland Security to secure the borders and the ports and to “ensur[e] the speedy, orderly, and efficient flow of lawful traffic and commerce.” *Id.* § 202. The Department of Homeland Security’s (DHS) “primary mission” is preventing terrorism in the United States and “ensur[ing]” that its component agencies’ functions “that are not related directly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress.” *Id.* § 111(b)(1).

In recent years, however, inspecting, processing, and detaining inadmissible arriving aliens has consumed an outsize proportion of OFO’s strained resources to the detriment of CBP’s national-security, counter-narcotics, economic-security, and trade-and-travel-facilitation missions. Beginning in 2016, a sustained and overwhelming surge of undocumented Haitian nationals, the majority of whom were not seeking asylum, sought admission to the United States through the San Ysidro Port

1 of Entry in San Diego. CBP made every effort to expand the Port's processing and
2 detention capacity, including implementing its contingency plan for surge events,
3 converting office and other spaces into temporary holding areas, diverting port of-
4 ficers from anti-narcotics functions, and using virtual processing to allow CBP of-
5 ficers and Border Patrol agents at other locations to process migrants remotely. But
6 the queue of migrants awaiting processing continued to grow, until eventually the
7 line stretched from the primary inspection booth inside the Port building "clear south
8 into Mexico." Pl. Ex. 17 at 160:12. In late May 2016, around the time the Port sur-
9 passed 1,000 individuals in custody and individuals were sleeping in the elements
10 for lack of holding space, San Ysidro stopped intake at the international boundary
11 and directed officers to focus their efforts on processing migrants in custody.

12 The surge continued into the fall of 2016, changed in composition, and spread
13 east to other ports of entry in OFO's San Diego Field Office and then to ports in the
14 Tucson, El Paso, and Laredo Field Offices. The severe overcrowding, case-pro-
15 cessing delays, and adverse impacts to frontline operations followed with it. By the
16 close of Fiscal Year (FY) 2016, ports in the four southwest border Field Offices had
17 encountered and processed more than 150,800 inadmissible aliens, a 70% increase
18 from the recent major surge in 2014. In FY 2016, the southwest border ports seized
19 8% less narcotics by weight than in FY 2015, a decrease that was not consistent with
20 rising trends in the years preceding and the years since. Def. Ex. 1 ¶ 21. From Octo-
21 ber 2016 to mid-April 2017, CBP spent more than \$45.25 million in overtime, tem-
22 porary details, and facilities in maintenance costs to address the surge.

23 In the fall of 2016, DHS and CBP took overarching steps to address the over-
24 crowding and lessen the strain from the unprecedented migrant surge on DHS's op-
25 erations. CBP created a Crisis Action Team (CAT). DHS and CBP approved the
26 construction of a temporary processing center in El Centro, California. The facility
27 ultimately did not open due to contracting issues, but DHS opened two other facili-
28 ties in Tornillo and Donna, Texas, later that year. And in November 2016, the CBP

1 Deputy Commissioner authorized the use of “metering” or “queue management”
2 procedures border-wide. Generally, when a port is metering, an officer stands at the
3 international boundary and screens pedestrians’ travel documents. Travelers with
4 facially legitimate documents are permitted to proceed across the border into the port
5 for inspection, and travelers without such documents may be instructed to wait until
6 the port has sufficient capacity to process their resource-intensive applications for
7 admission. There have been isolated missteps, particularly in the initial phases, but
8 the government’s policy is and has always been that aliens on U.S. soil must be
9 processed for admission. The Deputy Commissioner explained: “I just want our
10 folks to have an additional tool to keep conditions safe and working at our POEs.”
11 Pl. Ex. 69 at 935.

12 In January 2017, the surge abruptly ended. By that time, the southwest border
13 ports for the most part had stopped metering. But in spring 2018, the ports saw an-
14 other sustained increase in inadmissible aliens and again reported impacts to their
15 frontline operations. CBP also had evidence that a “caravan” of 550 undocumented
16 migrants was heading north to the border from Central America. Faced with increas-
17 ing numbers and evidence of a potential mass influx event, and seeking to avoid the
18 crisis that consumed the southwest border in 2016, the OFO Executive Assistant
19 Commissioner issued guidance to the four border Field Offices memorializing their
20 discretion to use queue management “[w]hen necessary or appropriate to facilitate
21 orderly processing and maintain the security of the port and safe and sanitary condi-
22 tions for the traveling public.” Def. Ex. 2. The guidance is clear that “[o]nce a trav-
23 eler is in the United States, he or she must be fully processed.” *Id.*

24 Although not all 550 caravan members reached the border at once, the number
25 of inadmissible arriving aliens continued trending upwards. DHS and CBP knew the
26 adverse impacts that a sustained migrant surge can bring, so in June 2018, the Sec-
27 retary of Homeland Security decided that “CBP must focus on its primary mission:
28

1 to protect the American public from dangerous people and materials while enhanc-
2 ing our economic competitiveness through facilitating legitimate trade and travel.”
3 Def. Ex. 3 at 294. The Secretary instructed CBP to structure its staffing and resources
4 at the southwest border ports of entry in order of CBP’s national-security, counter-
5 narcotics, economic-security, and trade-and-travel-facilitation mission sets, and to
6 use queue management to ensure that the ports have sufficient operational capacity
7 to implement those missions. *Id.* at 296. The Secretary explained that processing
8 undocumented aliens “remains a component of CBP’s mission,” *id.*, and indeed, it
9 did: The border Field Offices processed 13,604 more inadmissible aliens in FY 2018
10 than they did in FY 2017, and they referred twice as many of those inadmissible
11 arriving aliens for credible-fear interviews. Def. Ex. 4 at 2. “[B]ut priority should be
12 given to the” four identified mission sets. Def. Ex. 3 at 296.

13 The prioritization regime was successful. From FY 2018 to FY 2019, the bor-
14 der Field Offices’ narcotics seizure weights for fentanyl and methamphetamine in-
15 creased by 58% and 19%, respectively, and the value of interdicted outbound cur-
16 rency increased by more than \$2.4 million. Def. Ex. 5 at 304. During the same pe-
17 riod, the Field Offices saw a moderate increase in the total number of inadmissible
18 arriving aliens (from 124,876 to 126,001), and again referred twice as many aliens
19 for credible-fear interviews in FY 2019 (80,055) as they did in FY 2018 (38,399).
20 Def. Ex. 4 at 2. In November 2019, OFO directed the Field Offices to renew their
21 focus on the priority missions, and the Acting CBP Commissioner ordered the OFO
22 Executive Assistant Commissioner to continue prioritizing staffing and resources at
23 the ports in accordance with the Secretary’s June 2018 memorandum.

24 Plaintiffs contend that these and a host of other DHS and CBP actions since
25 2016 together constitute “the turnback policy,” which is a purported “overarching
26 agency policy directing th[e] unlawful withholding of mandatory action” under the
27 INA, and which was adopted with the “desire to limit access to the asylum process
28 at POEs for its own sake.” Pls.’ Mem. in Support of Mot. for Summ. J. 21, 29 (Pl.

MSJ; ECF No. 535-1). Plaintiffs contend that “the turnback policy” is unlawful under the Immigration and Nationality Act (INA), the Administrative Procedure Act (APA), the Due Process Clause, and the international law norm of non-refoulement.

Plaintiffs are wrong, and this Court should enter summary judgment for the government on all counts.

First, Defendants are entitled to summary judgment on Plaintiffs’ APA claims because they fail to challenge a “circumscribed, discrete agency action[.]” *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004). There is no such thing as “the turnback policy,” nor is there any evidence that the myriad government actions that Plaintiffs identify were taken pursuant to the same agency policy. Plaintiffs have “simply attach[ed] a policy label to disparate agency practices or conduct” and called it agency action, which under the APA they simply “may not” do. *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1207 (S.D. Cal. 2019). Further, the government’s border-wide metering decisions do not “give[] rise to direct and appreciable legal consequences,” *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016) (quotation marks omitted), and thus are not “final.”

Second, Defendants are entitled to summary judgment on Plaintiffs’ first APA claim (under 5 U.S.C. § 706(1)) because the government has not “directed [CBP] officers to unlawfully withhold” the government’s obligations under 8 U.S.C. §§ 1158 and 1225. *See* Pl. MSJ 21–23. Defendants respectfully maintain their position that §§ 1158 and 1225 do not impose obligations on the government toward aliens who stand outside the United States. But even if the statutes applied, the government has not “direct[ed] th[e] unlawful withholding of” its legal obligations. The southwest border Field Offices continue to inspect and process inadmissible arriving aliens and in fact referred almost five times as many of those aliens for credible-fear interviews in FY 2019 than they did in FY 2017. Def. Ex. 4 at 2. At *most*, such agency action is delayed, and Plaintiffs do not attempt to argue that delays attendant to metering were unreasonable. *See* Pl. MSJ 19–31. Thus, their § 706(1) claim fails.

1 *Third*, Defendants are entitled to summary judgment on Plaintiffs’ second
2 APA claim (under 5 U.S.C. § 706(2)) because the government’s border-wide meter-
3 ing decisions are statutorily permissible. *See* Pl. MSJ 24–25. Congress ordered CBP
4 to perform a number of critical national-security, counter-narcotics, economic-secu-
5 rity, and trade-and-travel functions at the ports and elevated DHS’s national-security
6 and counter-narcotics functions above all others, 6 U.S.C. §§ 111(b)(1), 211(c),
7 (g)(3), and the agency has reasonably exercised its “broad discretion to choose how
8 best to marshal its limited resources and personnel to carry out its delegated respon-
9 sibilities,” *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (citation omitted).

10 *Fourth*, each of the government’s border-wide metering decisions is well-sup-
11 ported by the facts, is the product of reasoned decisionmaking, and is not based on
12 an arbitrary and capricious interpretation of the INA. *See* Pl. MSJ 26–31. The stated
13 purpose of metering is to address capacity constraints. There is no “pretext” because
14 CBP *in fact was facing capacity constraints*. Even if the evidence showed that there
15 were other reasons for metering, “a court may not reject an agency’s stated reasons
16 for acting simply because the agency might also have had other unstated reasons.”
17 *Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019).

18 *Fifth*, the government has not violated class members’ procedural-due-process
19 rights, *see* Pl. MSJ 31–33, because they do not have a protected statutory interest
20 while they stand in Mexico. Even if class members had a protected interest, they
21 cannot obtain more than what the statute already provides.

22 *Sixth*, Plaintiffs’ Alien Tort Statute (ATS) claim (at 33–36) is not actionable.
23 There is no cause of action for purported violations of the non-refoulement doctrine,
24 and it would be an extraordinary exercise of lawmaking power for this Court to cre-
25 ate such a cause of action here.

26 *Finally*, even if Plaintiffs were to succeed on their claims, they are not entitled
27 to the permanent injunctive and declaratory relief they seek. Vacatur of the border-
28 wide metering decisions is an appropriate legal remedy that provides complete relief.

Moreover, the balance of the harms weighs starkly against an injunction of metering, as it would harm CBP's national-security and economic security functions and lead to overcrowded facilities where class members would suffer.

This Court should enter summary judgment for the government on all Claims.

LEGAL STANDARD

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted). The moving party can carry its burden: "(1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial." *Quidel Corp. v. Siemens Med. Solutions USA, Inc.*, --- F. Supp. 3d ---, 2020 WL 1820247, at *2 (S.D. Cal. 2020) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge" at the summary-judgment stage. *Id.* at *3 (quoting *Anderson*, 477 U.S. at 255). The non-movant's evidence "is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Anderson*, 477 U.S. at 255; *Quidel Corp.*, 2020 WL 1820247, at *3.

UNDISPUTED FACTS

A. Congress Charged DHS, CBP, and OFO With Numerous Duties to Safeguard America's Borders.

CBP's Office of Field Operations is the largest component of the largest federal law-enforcement agency in the United States, with operations spanning over 328 ports of entry within 20 field offices and 70 international locations. *See* Def. Ex. 6 at 1. Almost 30,000 OFO employees implement CBP's mission "[t]o safeguard

1 America's borders thereby protecting the public from dangerous people and materi-
2 als while enhancing the Nation's global economic competitiveness by enabling le-
3 gitimate trade and travel." Pl. Ex. 10, at 51:2-4; Def. Ex. 7 at 1.

4 Congress mandated that OFO "shall coordinate the enforcement activities of
5 [CBP] at United States air, land, and sea ports of entry to deter and prevent terrorists
6 and terrorist weapons from entering the United States at such ports of entry; conduct
7 inspections at such ports of entry to safeguard the United States from terrorism and
8 illegal entry of persons; prevent illicit drugs, agricultural pests, and contraband from
9 entering the United States; in coordination with the Commissioner, facilitate and
10 expedite the flow of legitimate travelers and trade; ... coordinate with the Executive
11 Assistant Commissioner for the Office of Trade with respect to the trade facilitation
12 and trade enforcement activities of [CBP]; and carry out other duties and powers
13 prescribed by the Commissioner." 6 U.S.C. § 211(g)(3) (numbering omitted).

14 OFO is only one of several offices within CBP. Congress has tasked CBP with
15 many additional functions, including to coordinate CBP's "security, trade facilita-
16 tion, and trade enforcement functions"; to direct and administer CBP's commercial
17 operations; to "detect, respond to, and interdict terrorists, drug smugglers and traf-
18 fickers, human smugglers and traffickers" and other national security threats from
19 abroad; to "ensure the overall economic security of the United States is not dimin-
20 ished by efforts, activities, and programs aimed at securing the homeland"; to "de-
21 velop and implement screening and targeting capabilities," including for passengers
22 and cargo; to "enforce and administer the laws relating to agricultural import and
23 entry inspection"; and, "in coordination with [ICE] and United States Citizenship
24 and Immigration Services [USCIS], [to] enforce and administer all immigration
25 laws ... including the inspection, processing, and admission of persons who seek to
26 enter or depart the United States, and the detection, interdiction, removal, departure
27 from the United States, short-term detention, and transfer of persons unlawfully en-
28 tering, or who have recently unlawfully entered, the United States." *Id.* § 211(c).

1 And CBP in turn is only one component agency of the Department of Home-
2 land Security (DHS). *Id.* § 211(a). DHS’s “primary mission[s]” are focused on se-
3 curing the nation and the prevention of terrorism and terrorist attacks. *See id.*
4 § 111(b)(1). Further, DHS is charged with not only preventing the entry of terrorists
5 and securing the borders, but also administering customs laws, conducting agricul-
6 tural inspections, carrying out all immigration enforcement functions, administering
7 the laws governing permissions for aliens to enter the United States, and “establish-
8 ing national immigration policies and priorities.” *Id.* §§ 202(1)–(7). “In carrying out
9 the foregoing responsibilities,” the Secretary shall “[e]nsur[e] the speedy, orderly,
10 and efficient flow of lawful traffic and commerce.” *Id.* § 202(8).

11 The southwest border Field Offices perform an immense job. In 2019, the
12 ports in those Field Offices processed approximately 49.2 million pedestrians; 73
13 million personal vehicles and 136.9 million personal passenger vehicles; 2.2 million
14 bus passengers; and 6.4 million trucks and 6.5 million truck containers. *See* Def. Ex.
15 8 at 1, 2, 4–5. OFO also “plays a vital role in interdicting illicit narcotics.” Def. Ex.
16 9 at 1. The “vast majority of all opioids interdicted by CBP are seized at ports of
17 entry.” *Id.* at 1; *see id.* at 4–5. From 2013 to 2017, 88% of CBP’s opioid seizures
18 occurred at ports of entry, and 75% of those seizures occurred at ports on the south-
19 west border. *Id.* at 1. CBP currently “does not have technology that screens all pack-
20 ages, cargo, or vehicles,” so the agency’s “ability to detect narcotics hidden on indi-
21 viduals, in vehicles, or comingled with shipments of goods currently relies heavily
22 on targeting intelligence and officer training and experience.” *Id.* at 16.

23 The ports of entry often operate with “significant shortages” of CBP officers.
24 *Id.* at 1. As of May 2018, there were “4,000 [CBP officers] less than the number
25 needed to staff all ports of entry. Ports of entry in the San Diego and Tucson areas ...
26 have required CBP to assign temporary staff details to fulfill staffing needs at those
27 locations. The practice of temporary details has become so systemic ... that CBP has
28 named it ‘Operation Overflow.’” *Id.* at 2; *see also* Def. Ex. 10 at 836.

B. The 2016 Migration Surge Stretches the San Ysidro Port of Entry's Capabilities and Diverts Resources From Other Statutory Missions.

Beginning in February 2016, inadmissible Haitian nationals traveling from Brazil began presenting themselves in significant numbers at the San Ysidro Port of Entry in San Diego, the busiest land border crossing in the Western Hemisphere. *See* Pl. Ex. 33 at 443; Def. Ex. 11 at 1. By May 2016, CBP officials in Southern California “exhausted every effort” to “expand any additional processing and [short-term] detention capacity” to accommodate this influx. Pl. Ex. 17 at 160:9–18. Measures included activating the San Ysidro Admissibility Enforcement Unit’s (AEU) “Max Capacity Contingency Plan” San Ysidro’s Admissibility Enforcement Unit, Pl. Ex. 35 at 271, which involved “convert[ing] office and administrative spaces to temporary holding areas to increase capacity to over 900 persons,” Pl. Ex. 33 at 444; Pl. Ex. 29 at 660; Def. Ex. 12; converting a maintenance area recently vacated by the General Services Administration (GSA) into a holding area, Pl. Ex. 34 at 339; almost doubling the number of CBP officers assigned to the AEU per shift, Pl. Ex. 35 at 271; diverting officers from anti-narcotics functions to assist the AEU with processing, Pl. Ex. 35 at 271; using “virtual processing” to allow CBP officers in the San Diego, Los Angeles, Detroit, and Miami Field Offices and Border Patrol agents in the El Centro Sector to assist in processing migrants at San Ysidro, *id.*; Pl. Ex. 34 at 338; Def. Ex. 10 at 835; housing detainees at nearby Border Patrol facilities, if the facilities “were not already at capacity,” Pl. Ex. 33 at 445; and transferring processing of all I-94 arrival records for documented non-resident aliens to the Otay Mesa Port of Entry to free up workstations at San Ysidro, Pl. Ex. 34 at 339. Even with all of these measures, undocumented aliens still had to wait to be processed and detained. Aliens “without documents for admission would queue in an area between the [international boundary] at the port of entry and the primary [pedestrian] lanes to wait until there was sufficient space” to be processed. Pl. Ex. 17 at 159:12–19. By late May 2016, this queue stretched from the primary inspection booths at the POE

1 “clear south into Mexico.” *Id.* at 160:12.

2 The numbers of undocumented aliens seeking entry at San Ysidro continued
3 to grow, to the point that the Port reached surpassed 1,000 individuals in custody
4 and CBP officers at San Ysidro were compelled to “stop intake at the international
5 boundary” because there “was no space” left, and they needed to bring in everyone
6 from the queue “to make sure they were not left in the elements.” Pl. Ex. 17 at 160:6–
7 161:9; Def. Ex. 10 at 836; *see also* Def. Ex. 1 ¶ 22. On May 26, 2016, when asked
8 by a media outlet about the “several hundred people [] sleeping on the floor of the
9 [San Ysidro] pedestrian entrance,” the San Ysidro Port Director directed his staff “to
10 do all we can to get this under control.” Pl. Ex. 41, at 552–53. He instructed them
11 “to continue to process in a timely manner” and locate temporary holding space “as
12 efficiently as possible.” *Id.* at 552. On May 27, 2016, upon receiving word that
13 “[o]ne of the shelters” in Mexico was bringing “a van full” of individuals to the limit
14 line, the San Ysidro Assistant Port Director instructed the Watch Commander to
15 “hold them at the turnstile and not allow them to come into the line. We have no
16 space and it is ugly.” Pl. Ex. 42 at 127; *see also* Def. Ex. 1 ¶ 21. Shortly thereafter,
17 the Port Director instructed his deputies “to hold the line the best we can” to enable
18 staff to “process cases and only focus on processing case[s] at this time.” Pl. Ex. 43
19 at 657. The next evening, the Assistant Port Director remarked that “[t]his could go
20 on for a while. When they bring the 74+ from the shelter, the 50 I saw this morning
21 plus whatever else is arriving, we will be overcrowded.” Pl. Ex. 44 at 316. In re-
22 sponse, the Port Director ordered his deputies to “coordinate and bring small groups
23 at a time and hold the line to prevent any from entering.” *Id.*

24 On May 29, 2016, San Ysidro leadership notified supervisors that the govern-
25 ment of Mexico had “set[] up shelters in Tijuana to house those waiting to claim
26 credible fear/asylum,” rather than continue to allow them to wait unsheltered in “a
27 line staged on the Mexican side” of the border. Pl. Ex. 11 at 298. The Mexican gov-
28 ernment would [REDACTED]

1 [REDACTED] *Id.* CBP officers were to “staff[] the ... Limit Line to ensure that trav-
2 elers have documents” and ensure that “those coming to seek credible fear/asylum
3 are identified and directed appropriately at the onset if feasible.” *Id.*

4 To add to the operational challenges posed by surge, San Ysidro was in the
5 middle of a multi-phase, multi-year “complete reconfiguration and expansion of the
6 port” that “included the demolition and construction of the LPOE [land port of en-
7 try], including primary and secondary inspection areas, administration and pedes-
8 trian buildings, and all other support structures.” Def. Ex. 11 at 1. In late June 2016,
9 as phase 2 of the GSA construction project began, the “PedEast” facilities that San
10 Ysidro had utilized in May to create makeshift detention space for the overflow of
11 undocumented migrants were demolished. Pl. Ex. 33 at 444; Def. Ex. 12. This effec-
12 tively cut the Port’s short-term detention capacity from [REDACTED] (which it achieved by
13 converting office and other space, *see* Pl. Ex. 33 at 444) to [REDACTED]. Def. Ex. 10 at 837.
14 During the surge at San Ysidro, officers were regularly reminded that “[u]nder no
15 circumstances will an asylum applicant be denied entry into the U.S. Please direct
16 all applicants to the Pedestrian West (PedWest) facility for proper intake and pro-
17 cessing.” Pl. Ex. 8 at 069, 070, 071 (instructions issued in July, Sept., and Nov. 2016
18 to the San Ysidro and Otay Mesa POEs).

19 **C. The Surge’s Adverse Impacts Expand to Other Ports of Entry.**

20 The migrant surge continued into the fall of 2016, began spreading east, and
21 started to change in composition to include more family units (FAMU or FMUA)
22 and unaccompanied alien children (UAC). *See* Pl. Ex. 10 at 313:9–319:8. Other ports
23 began to experience severe overcrowding, case-processing delays, and related ad-
24 verse impacts to their operations. For example, on September 3, 2016, the El Paso
25 Port of Entry in Texas, which around that time reported a detention capacity of [REDACTED]
26 persons, Def. Ex. 13 at 100, “received 92 cases in one shift. Since th[at] date, the
27 Port [] experienc[ed] a significant spike in FAMU cases. In the ten day span between
28 September 4 and September 13 the Port [was] averaging [REDACTED] subjects in custody per

1 day.” Def. Ex. 14 at 893–94; *see* Def. Ex. 15 at 737 (reporting on Sept. 9, 2016 “an
2 all-time high of 265 detainees in custody”). “During this spike, an average of 23%
3 FAMU cases [were] held at a POE in excess of 72 hours pending placement.” Def.
4 Ex. 14 at 894. The Port was “providing up to 1,000 meals per day using microwaves.
5 The facility [was] not equipped for this amount of volume.” *Id.* “Active caseload
6 management [was] being performed by transporting cases for processing to less af-
7 fected Ports.” *Id.* But the El Paso Field Office “has no ground transportation contract.
8 All transports are performed by OFO officers.” *Id.* at 893. “[T]he increased trans-
9 ports between Ports, to ERO facilities, and to the Airport is straining OFO vehicle
10 and personnel resources.” *Id.* at 894. Moreover, the Field Office was “scheduled to
11 detail eight (8) Officers to San Diego” on October 3, 2016. *Id.*; *see also* Def. Ex. 16
12 at 099 (on Sept. 21, 2016, noting need for overflow holding area and more staffing).

13 On September 12, 2016, “at least 950 Haitians” arrived in Tijuana to be pro-
14 cessed at San Ysidro. Pl. Ex. 12 at 741; Pl. Ex. 50 at 747–48. “Haitians [were] also
15 [] arriving in increasing numbers at other ports of entry in [preceding] weeks, such
16 as Calexico, which is far less resourced than San Ysidro.” Pl. Ex. 12 at 741. Repre-
17 sentatives from the U.N. High Commissioner for Refugees (UNHCR) “confirmed”
18 that “most” of the Haitian nationals were “not seeking asylum. ... Instead, they
19 [were] expressing interest in working and/or reuniting with family in the” United
20 States. *Id.* “At least half of CBP’s staffing and space previously dedicated to pro-
21 cessing asylum-seekers [was] being used to process Haitian parole cases.” *Id.* at 742.
22 UNHCR acknowledged that “[b]oth CBP and ICE in Southern California [were] ...
23 doing what they c[ould] with existing resources to process the Haitians expeditiously
24 and humanely and maintain regular processing of asylum-seekers.” *Id.* at 741–42.

25 On September 27, 2016, the El Paso POE reported that it “ha[d] 361 detainees
26 in custody” (surpassing its September 9 “all-time high of 265 detainees in custody,”
27 Def. Ex. 15 at 737) “as more FAMU and UAC continue to arrive.” Def. Ex. 17 at
28 817. On September 28, 2016, the El Paso POE reported that it had diverted resources

1 from various other operational areas “to address the current Credible Fear processing
2 and detention overflow at the” Port. Def. Ex. 18 at 684. It redirected officers who
3 work on terrorism-related enforcement to assist with inadmissible alien case pro-
4 cessing and related duties (*see id.*, “ATCET [Anti-Terrorism Contraband Enforce-
5 ment Team] Supervisors and Officers have been re-directed to assist with PCS [Pass-
6 port Control Secondary], PVP [Passenger-Vehicle-Pedestrian] and transportation
7 duties until further notice”); suspended new-officer training; redirected training of-
8 ficers and firearm staff to assist with inadmissible alien case processing and trans-
9 portation; redirected “CBP Techs assigned to the Administration Office ... to each
10 bridge location to assist with feeding and other duties as necessary to keep the Of-
11 ficers focused on processing.” Def. Ex. 18 at 684; *see* Def. Ex. 19 at 859–68 (images
12 of overcrowding at the El Paso Field Office’s ports of entry). Even so, on September
13 30, 2016, ports of entry in the El Paso Field Office ports “surpassed 400” in custody.
14 Def. Ex. 20 at 830. The situation was “critical.” *Id.* Nevertheless, OFO was in the
15 process of transporting Haitian migrants into the El Paso Field Office from the San
16 Diego Field Office to relieve the pressure at the California ports. *Id.*

17 On October 3, 2016, the El Paso Field Office reported that the surge of UACs
18 and family units “continues to create adverse impacts to port operations, as UAC
19 and FAMU’s [*sic*] are being placed throughout administrative spaces of the port.
20 Additionally, CBP personnel are being reassigned to support this influx, impacting
21 other critical areas.” Def. Ex. 21 at 755. The same day, the El Paso Border Patrol
22 Sector reported that it was “barely staying afloat,” and requested that the El Paso
23 Field Office move its detainees out of Border Patrol’s Paso Del Norte facility and
24 into others because Border Patrol was “currently out of policy ... by holding subjects
25 in non-holding cells.” Def. Ex. 22 at 270.

26 Other southwest border ports experienced similar overcrowding and adverse
27 impacts on port operations. *See, e.g.*, Def. Ex. 23 (Oct. 3, 2016 report that Browns-
28 ville POE had to re-allocate staff to address “high volume of detainees”); Def. Ex.

24 (Oct. 14, 2016 report that the Laredo Field Office had to divert staff, detail officers, and was “expanding use of port administrative space for temporary holding,” which required additional personnel); Def. Ex. 25 (Oct. 16, 2016 report from the Port of Hidalgo); Def. Ex. 26 (Oct. 25, 2016 report from the Port of Hidalgo); Def. Ex. 27 (Oct. 10, 2016 report from the Port of San Luis in the Tucson Field Office); Pl. Ex. 16 at 46:5–13 (numbers in custody at San Luis were “unsafe” and “unhealthy”); Def. Ex. 28 (Oct. 19, 2016 report from Port of Nogales); Def. Ex. 29 (Oct. 25, 2016, Ports of Nogales and San Luis had “far exceeded capacity”).

On October 5, 2016, [REDACTED]

[REDACTED] the Deputy CBP Commissioner asked ICE about the possibility of increasing the rate of pickups from the San Ysidro and Calexico Ports of Entry. Def. Ex. 30 at 527. The Acting ICE Director responded that ICE was “currently at 39,650 aliens in custody,” “the highest level in [its] history.” *Id.*

On October 17, 2016, the San Diego Field Office was utilizing 155% of its detention capacity, the Tucson Field Office was utilizing 231% of its detention capacity, the El Paso Field Office was using 99% of its detention capacity, and the Laredo Field Office was utilizing 106% of its detention capacity. Def. Ex. 31 at 585. In FY 2016, the southwest border ports of entry encountered more than 150,800 inadmissible aliens, a 70% increase over FY 2014. Def. Ex. 32 at 562.

D. DHS and CBP Take Additional Steps to Address the Surge.

Against this backdrop, in the fall of 2016, DHS and CBP evaluated and took additional, overarching steps to address overcrowding and to lessen the strain of the unprecedented migrant surge on DHS operations and mitigate humanitarian concerns. These steps involved plans to increase processing and holding capacity, as well as to meter the intake of aliens without documents sufficient for lawful entry.

In October 2016, the CBP Commissioner “established a single CBP Crisis Action Team,” Def. Ex. 33 at 4, the purpose of which was “to mitigate impacts to

mission essential functions,” Def. Ex. 34 at 710, and “to learn lessons from and avoid repeating mistakes made during a prior surge of UAC in 2014,” Def. Ex. 33 at 4. The Crisis Action Team (CAT) was “[c]omposed of representatives from various CBP components” and “compiled data and developed strategies to address the surge and overcrowding.” *Id.* at 4.

On October 18, the day ICE reported surpassing 41,000 detention beds, CBP Deputy Commissioner McAleenan communicated to CBP leadership that the Secretary and Commissioner had approved the establishment of a temporary processing center for Haitian nationals in El Centro, California. Pl. Ex. 47 at 116–17. Considerations supporting the facility’s establishment included the “current numbers in Baja California and throughout the transit route from Panama,” the “lack of near-term removals to Haiti” because of Hurricane Matthew, the lack of “near-term agreement with Brazil for returns of Haitians with residency status there,” the “pressure on Mexico and Central American partners” caused by “over 12,000 Haitian nationals in various stages of transit and high-level requests from Mexico and others for US assistance,” and “no immediately available path for providing foreign assistance for Central American partners to conduct detention and removal operations.” *Id.* at 116. In this broader discussion of regional migration patterns and international coordination, Mr. McAleenan also noted that [REDACTED]

[REDACTED] *Id.*

On October 30, 2016, the CBP Commissioner directed his staff “to continue El Centro work” and “look[] at bringing the Nogales facility from 2014 back on line.” Pl. Ex. 55 at 175. On or about October 31, 2016, the Secretary and the Commissioner “approved moving forward with the plan to establish the infrastructure that would support [REDACTED] soft-sided FMUA or UAC beds.” *Id.* at 173. On or about

1 November 1, 2016, the El Centro facility was expected to have a “soft opening on
2 November 14th and a full opening on November 28th.” Pl. Ex. 56 at 316.

3 On November 2, 2016, the OFO Executive Assistant Commissioner wrote to
4 his deputies that he was “seeing engagement by senior leaders at the department and
5 in the administration on our migration and detention issues.” Pl. Ex. 60 at 228. In
6 addition to steps identified above, DHS was working to [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED] *Id.* at 228; *see also* Pl. Ex. 59 at 845

10 [REDACTED]
11 [REDACTED]
12 [REDACTED].
13 At this time, the CAT began reporting on the ongoing DHS-coordinated plans
14 “for addressing the surge of migration along the Southwest border.” Pl. Ex. 61 at
15 530. [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED] *Id.*

23 On November 7, 2016, both the San Ysidro and Calexico Ports of Entry were
24 “at capacity and [were] prioritizing intake to manage the flow.” Pl. Ex. 62 at 790.
25 That same day, the CAT held an “operational conference call” with the San Diego
26 Field Office to “discuss the ‘soft opening’ of the El Centro Processing center” on
27 November 14. *Id.* [REDACTED]
28 [REDACTED]

1 [REDACTED] *Id.* [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED] *Id.* at 790,
 5 791. [REDACTED]
 6 [REDACTED]
 7 [REDACTED] *See id.* at 790.

8 On November 9, 2016, the CAT informed CBP leadership that the “El Centro
 9 Facility will NOT have a soft opening of 11/14 and will NOT go live on 11/28.
 10 Planning and contracting will continue but NO TDY personnel from OFO and ICE
 11 will be deployed. CBP will continue to work and have [the] facility ready for when
 12 trigger is pulled to staff it.” Pl. Ex. 65 at 879. “[T]he issue [was] bed space.” *Id.* at
 13 878. [REDACTED]
 14 [REDACTED]
 15 [REDACTED] Pl. Ex. 66 at 216. The CAT continued to
 16 discuss and work on other options for soft-sided facilities. Pls.’ Ex. 65, at 879.

17 On November 10, 2016, CBP Deputy Commissioner McAleenan discussed
 18 “meter[ing] the flow ... at the POE bridges (at the middle of the bridge) at some of
 19 our Texas POEs to prevent the overflow at the actual POE.” Pl. Ex. 67 at 936; *see*
 20 *also* Pl. Ex. 68 (Commissioner Kerlikowske and Mr. McAleenan “briefed” Secretary
 21 Jeh Johnson “that [they] wanted to increase efforts to meter arrivals of non-UAC,
 22 non-Mexican CF cases mid-bridge”). That afternoon, Secretary Johnson approved
 23 the proposal. Pl. Ex. 67 at 936. OFO was directed to “proceed with informing [the]
 24 OFO field leadership at some of our Texas POEs of this approval so they can start
 25 this new operational alignment to bring relief at the POEs.” *Id.*

26 On November 11, 2016, the OFO Executive Assistant Commissioner in-
 27 formed the CBP Deputy Commissioner that he was “on board with the metering,”
 28 and that he “advised [the Directors of Field Operations] via telephone last night to

1 start.” Pl. Ex. 69 at 935. The Deputy Commissioner responded: “[t]he implementa-
2 tion [of metering] is subject to your discretion and theirs (and PDs’) on what will
3 work best operationally and whether it is required on any given day or any specific
4 location.” *Id.* The Deputy Commissioner explained that “[REDACTED]
5 [REDACTED] I just want our folks to
6 have an additional tool to keep conditions safe and working at our POEs.” *Id.*

7 On November 11, the El Paso POE reported “406 detainees in custody.” Def.
8 Ex. 13 at 100; *see also* Def. Ex. 35. The Port “beg[a]n metering at the middle of the
9 bridge at all 3 crossing locations.” Def. Ex. 13 at 100. On November 11 and 12,
10 2016, the Tucson, Laredo, and El Paso Field Offices transmitted instructions to their
11 ports authorizing metering-like practices. *See* Pl. Ex. 70 at 662 (Nov. 11, 2016 email
12 from Tucson Field Office to Port Directors); Pl. Ex. 71 at 496; Pl. Ex. 13 at 607
13 (Nov. 12, 2016 email from Laredo Field Office authorizing ports to use “appoint-
14 ment[s]” [REDACTED]); Def. Ex. 36
15 (Nov. 11, 2016 email from Laredo Field Office to Port Directors).

16 Metering practices at this time were “not standardized.” Pl. Ex. 20 ¶ 47. For
17 example, on November 17, 2016, the Port of El Paso reported that it was using an
18 appointment system and that it was metering aliens “while on the U.S. side of the
19 bridge [walkway into the port].” Pl. Ex. 74 at 450. Upon learning that aliens may be
20 being turned away while on U.S. soil, OFO headquarters immediately began “work-
21 ing with the port to address” the issue. Def. Ex. 37 (Nov. 18, 2016 email noting that
22 the Ports of El Paso and Hidalgo were turning people away on U.S. soil, and that it
23 was being addressed); Def. Ex. 36 (Nov. 15, 2016 email from OFO headquarters
24 clarifying to Laredo Field Office that “[i]f any individual arrives at POE, we cannot
25 just send them back to MX ... but must process them upon arrival”); *see also* Def.
26 Ex. 38; Pl. Ex. 102 at 137:10–20 (the officers at El Paso were not stationed correctly
27 during the first week of metering in November 2016, “so we had some corrections
28 to make”); Def. Ex. 39 (El Paso “course corrected” and ceased using appointment

1 system). At this and all times, the use of physical force to return an asylum seeker to
 2 Mexico was “CBP[’s] policy and procedures pertaining to the processing of asylum
 3 seekers.” Pl. Ex. 8, at 043 (report from CBP’s Office of Professional Responsibility
 4 (OPR)).¹

5 On November 15, 2016, the CAT informed CBP leadership that the planned
 6 Nogales Processing Center was on hold. *See* Pl. Ex. 72 at 938, 939. The CAT ex-
 7 plained that [REDACTED]

8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED] *Id.* at 939. The same day, the CAT informed CBP leadership that a “No-
 11 tice to Proceed issued last night to erect a temporary CBP processing center” at
 12 Tornillo “with 500 bed capacity with option to expand.” *Id.*

13 CBP then stood up two soft-sided facilities, one on November 25, 2016, in
 14 Tornillo, Texas, and the other on December 10, 2016, in Donna, Texas. Def. Ex. 33
 15 at 5; *see also* Pl. Ex. 33 at 445; Def. Ex. 42 (Dec. 8, 2016 CAT report). From No-
 16 vember 25 until February 14, 2017, when the facility went to stand-by status, the
 17

18 ¹ Plaintiffs’ “undisputed facts” recite a handful of unrelated incidents involving al-
 19 leged coercion or use of physical force, claiming that these incidents are related to
 20 metering in 2016 and 2017. *See, e.g.*, Pl. MSJ 5 & n.4, 11. The one cited use-of-
 21 force incident in January 2017 resulted in an internal OPR investigation and disci-
 22 pline. Pl. Ex. 8; Def. Ex. 40 (disciplinary letter for unbecoming conduct and “failure
 23 to follow procedures”). Plaintiffs cite only three incidents of claimed coercion from
 24 only one POE (San Ysidro), in which Plaintiffs were allegedly coerced in May 2017
 25 into withdrawing their asylum applications. Pl. MSJ 5 n.4. Yet Plaintiffs do not, and
 26 cannot, connect these claimed incidents to any overarching or border-wide DHS or
 27 CBP policy, let alone to the decisions to implement metering. The most Plaintiffs
 28 cite is a San Diego Field Office policy regarding a “streamlined withdrawal” process
 for aliens who chose to withdraw their applications for admission. *See* Pl. Ex. 7 at
 611. Under that local policy, “[i]f the applicant indicates a request for asylum or
 articulates a fear of returning,” he or she “must” be referred for a credible-fear inter-
 view. Def. Ex. 41 at 619; *see also* Pl. Ex. 7 at 611.

1 Tornillo facility held a total of 5,721 aliens. Def. Ex. 33 at 6. From December 10
2 until February 10, 2017, when the facility went to stand-by status, the Donna facility
3 held 2,172 aliens. *Id.*

4 In December 2016, as the numbers of migrants abated, most ports stopped
5 using metering-like practices to control intake of aliens without documents sufficient
6 for lawful entry. Def. Ex. 43 (Dec. 17, 2016 custody report showing decreased num-
7 bers); Pl. Ex. 102 at 86:15–19 (El Paso engaged in metering for three weeks begin-
8 ning in November 2016); *accord* Pl. Ex. 20 ¶ 41 (noting that metering had ceased in
9 Nogales, Arizona in December 2016).²

10 In January 2017, the surge “abruptly, drastically, and unexpectedly ended.”
11 Def. Ex. 33 at 2; *see also id.* at 5 (“[W]itnesses ... were stunned at how low the
12 numbers were.”). “In March 2017, several CBP executives recommended perma-
13 nently closing the [Donna and Tornillo] facilities (which at that time were in stand-
14 by status) because they believed the migration levels would remain low due to policy
15 changes and other factors.” *Id.* at 8. But Deputy Commissioner “McAleenan decided
16 to keep the facilities in stand-by status for one additional month” because “he wor-
17 ried [about] another backup,” “he was mindful that a recent Executive Order and
18 DHS guidance ... instructed CBP to ensure sufficient short-term detention capacity,”
19 he was concerned that the migrants’ initial reluctance to come to the U.S. after the
20 inauguration might wear off,” and “he feared the annual Spring migration increase.”
21 Def. Ex. 33 at 8 (footnote omitted).

22 Between October 1, 2016, and April 12, 2017, CBP spent more than \$45.25

23
24 ² Although San Ysidro did not cease metering in December 2016, it was usually not
25 metering between February and December 2017 due to the low numbers. *See* Pl. Ex.
26 17 at 258:15–21. In April 2017, upon learning of a complaint that a CBP supervisor
27 turned back an individual at the border, *see* Def. Ex. 44, port leadership promptly
28 messaged San Ysidro and Otay Mesa managers: “Any asylum applicant we encoun-
ter should be taken into custody, escorted to the security office, and then transported
to AEU for proper intake and processing. We should not be sending any asylum
seekers back to Mexico. Please remind our officers.” Def. Ex. 45.

1 million to address the migrant surge. Pl. Ex. 33 at 446. This included OFO's ex-
2 penditure of \$15.76 million in overtime, temporary duty assignments, and operations
3 support; Border Patrol's expenditure of \$9.13 million in overtime, TDY, and opera-
4 tions support; and more than \$20.24 million in facilities and maintenance costs. *Id.*

5 **E. As the 2018 Migrant Caravan Approaches, CBP Issues Written Metering**
6 **Guidance.**

7 In early 2018, the number of undocumented aliens approaching the border
8 began to rise and "start[ed] to reach a high point in the spring of 2018." Pl. Ex. 10 at
9 68:19–20. In January 2018, the southwest border Field Offices processed 9,930 in-
10 admissible arriving aliens. Def. Ex. 46 at 4. In February 2018, the Field Offices pro-
11 cessed 10,085 inadmissible arriving aliens. Def. Ex. 47 at 4. In March 2018, the Field
12 Offices processed 12,957 inadmissible arriving aliens. Def. Ex. 48 at 4. In April
13 2018, the Field Offices processed 12,295 inadmissible arriving aliens. Def. Ex. 49
14 at 4. Ports began to report "impacts to frontline functions" from the "increase in
15 detainees." Def. Ex. 50 at 853 (Apr. 4, 2018 email from the El Paso Assistant Direc-
16 tor of Field Operations); *see also* Def. Ex. 51 (Apr. 3, 2018 Laredo Field Office
17 report of increased numbers and impact on processing and holding capacity, alt-
18 hough "currently manageable"); Def. Ex. 52 (Apr. 18, 2018 San Ysidro report of
19 passenger officers being diverted to provide emergency case-processing assistance).

20 Between March 31, 2018, and April 23, 2018, CBP received information that
21 a migrant caravan originating in Central America was making its way north from
22 southern Mexico to the U.S.-Mexico border. *E.g.*, Pl. Ex. 80. On April 21, 2018, 550
23 members of the caravan arrived in Hermosillo, Sonora (a city about 175 miles south
24 of Nogales, Arizona), intending to "continu[e] their voyage northward." *Id.* at 784.
25 On April 24, CBP Commissioner McAleenan wrote to his deputies: "While we are
26 working diligently with Mexico to address as many caravan members as possible,
27 pressing ICE and others to prepare effective coordination of detention and immigra-
28 tion proceedings, and recommending strong posture changes for [the Secretary's]

1 decision, it is increasingly likely that we will face the arrival of a large portion of
2 these 500–600 individuals ... in the coming days without a change in enforcement
3 posture” Pl. Ex. 81 at 778. Commissioner McAleenan continued: “I know that
4 you have been planning and preparing, and that our field leadership and our officers
5 will act with utmost professionalism and competence, in accordance with law, reg-
6 ulation, and CBP policy, as well as the guidance from the Secretary to effectively
7 enforce the immigration laws of the United States, while appropriately considering
8 and processing claims of fear for those seeking protection. Please confirm that you
9 have sent out guidance regarding safe processing and port security and capacity is-
10 sues relating to queue management. Please confirm that, absent special circum-
11 stances, we will utilize ER [expedited removal], vice NTA [notice to appear], and
12 that release decisions will be made by ICE unless there is a medical emergency or
13 humanitarian emergency.” *Id.*

14 On April 25, 2018, at about 9:00 AM, the San Ysidro Port of Entry had [REDACTED]
15 individuals in custody, representing 92% of its detention capacity. Def. Ex. 53 at
16 712. Around 1:00 PM, the Mexican government notified CBP that [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 Def. Ex. 54 at 632. That day, San Ysidro had brought in “50 Mexican Family Units
20 claiming asylum.” Def. Ex. 55 at 632. On April 26, 2018, at about 9:00 AM, the San
21 Ysidro Port of Entry had [REDACTED] individuals in custody, representing 104% of its deten-
22 tion capacity. Def. Ex. 56 at 645.

23 On April 27, 2018, the OFO Executive Assistant Commissioner issued a
24 memorandum with the subject line “Metering Guidance” to the Directors of Field
25 Operations (DFOs) for the El Paso, Laredo, San Diego, and Tucson Field Offices.
26 *See* Def. Ex 2. The memorandum states: “When necessary or appropriate to facilitate
27 orderly processing and maintain the security of the port and safe and sanitary condi-
28 tions for the traveling public, DFOs may elect to meter the flow of travelers at the

land border to take into account the port’s processing capacity.” *Id.* When metering, “[p]orts should inform the waiting travelers that processing at the port is currently at capacity and CBP is permitting travelers to enter the port once there is sufficient space and resources to process them.” *Id.* DFOs “may establish and operate physical access controls at the borderline.” *Id.* Ports “may not create a line specifically for asylum-seekers only, but could, for instance, create lines based on legitimate operational needs, such as lines for those with appropriate travel documents and those without such documents.” *Id.* “At no point may an officer discourage a traveler from waiting to be processed, claiming fear of return, or seeking any other protection.” *Id.* “Once a traveler is in the United States, he or she must be fully processed.” *Id.*

Thus, the memorandum clarifies that port leaders may exercise their discretion to engage in metering “to facilitate orderly processing and maintain the security of the port and safe and sanitary conditions for the traveling public.” Def. Ex. 2. Metered travelers are asked to wait on the other side of U.S.-Mexico border until there is “sufficient space and resources to process them.” *Id.* One factor in assessing “sufficient space and resources” is the port’s detention capacity. Def. Ex. 57 ¶ 6; Def. Ex. 58 ¶¶ 13–16. A port’s capacity to hold individuals is not a fixed number, but is instead “fluid.” Pls.’ Ex. 14, at 291:1–3. Although GSA has established the ports’ numerical “cell capacit[ies]” (which is typically what is reported as the port’s physical detention capacity), “in reality, [CBP] can hold far less” than that maximum-occupancy number. Pl. Ex. 15 at 967. “GSA does not take into account space for sleeping.” *Id.*; *see also* Pls. Ex. 102 at 58:15–21. The reported detention capacity number also does not account for the demographics of those in custody, which CBP must account for when allocating detention space; for example, “a family unit with a male head of household who has children who are older and another family unit with a female head of household who has relatively young children” are not “able to [be] detain[ed] ... in the same detention areas or holding” areas. Pl. Ex. 14 at 289:19–288:2; *see also, e.g.*, Def. Ex. 59 at 055 (CBP’s Nat’l Transportation, Escort, and

1 Detention Standards (TEDS) requiring gender and juvenile/adult segregation in
2 CBP's hold rooms); Def. Ex. 57 ¶ 10; Def. Ex. 60 ¶ 7; Def. Ex. 58 ¶¶ 13–15.

3 The memorandum was issued to give the ports the ability “to address the ca-
4 pacity” for “large numbers of volumes” of inadmissible aliens attempting to cross
5 into the United States. Pl. Ex. 10 at 70:6–13. There is “[n]o other reason” the mem-
6 orandum was issued. *Id.* at 70:18. The guidance “was not desired to deter migrants
7 from entering the [United States].” Pl. Ex. 10 at 70:1–5; *see also* Pl. Ex. 69 at 935
8 (Nov. 11, 2016 email from Mr. McAleenan: “I just want our folks to have an addi-
9 tional tool to keep conditions safe and working at our POEs.”).

10 **F. DHS Directs CBP to Prioritize Statutory Mission Sets.**

11 From FY 2017 to FY 2018, the number of inadmissible arriving aliens pro-
12 cessed by the southwest border Field Offices crept upwards, and the proportion of
13 those aliens who were placed into expedited removal and referred for a credible-fear
14 interview doubled. In FY 2017, those Field Offices processed 111,275 inadmissible
15 aliens, 17,284 of whom were placed into expedited removal and referred for a cred-
16 ible-fear interview. Def. Ex. 4 at 2. In FY 2018, those Field Offices processed
17 124,879 inadmissible arriving aliens, 38,399 of whom were placed into expedited
18 removal and were referred for a credible-fear interview. *Id.*

19 On June 5, 2018, the Secretary of Homeland Security issued a memorandum
20 to the CBP Commissioner entitled “Prioritization-Based Queue Management.” *See*
21 Def. Ex. 3. The Secretary explained that “apprehensions of those crossing our border
22 illegally between the ports of entry and the number of arriving aliens determined to
23 be inadmissible at ports of entry continue to rise,” all while CBP’s “resources remain
24 strained along the Southwest Border. Inadmissible arriving aliens presenting at ports
25 of entry, many of whom arrive without possessing appropriate travel and identity
26 documents required by law, such as a visa and passport, require additional pro-
27 cessing time that delays the flow of legitimate trade and travel.” Def. Ex. 3 at 294.

28

1 The Secretary instructed that “CBP must focus on its primary mission: to pro-
2 tect the American public from dangerous people and materials while enhancing our
3 economic competitiveness through facilitating legitimate trade and travel.” *Id.* “The
4 processing of travelers without documentation draws resources away from CBP’s
5 fundamental responsibilities.” *Id.* at 295–96. “Moreover,” the Secretary continued,
6 “staffing at Southwest Border ports of entry is below our target level for almost all
7 major ports, and our officers are increasingly working extensive overtime hours each
8 pay period, leading to increased fatigue and stress on the workforce. At several of
9 the largest ports of entry, upwards of 10 percent of the CBP officer workforce are
10 engaged in immigration secondary screening and processing functions, primarily ad-
11 dressing persons presenting without documents sufficient for admission or other
12 lawful entry.” *Id.* at 296.

13 Thus, “[i]n recognition of (1) the continued prevalence of security threats,
14 (2) the dire consequences of illicit narcotics on our communities (especially the dev-
15 astating opioid epidemic), (3) the staffing and resource challenges summarized
16 above, and (4) the increase of irregular migration flows,” the Secretary “direct[ed]
17 the Commissioner] to initiate a 30-day pilot program to prioritize staffing and oper-
18 ations at all Southwest Border ports of entry in accordance with the following order
19 of priority”: (1) national-security efforts; (2) counter-narcotics operations; (3) eco-
20 nomic security: trade and cargo processing efforts to facilitate lawful commerce into
21 the United States, while enforcing trade laws, protecting agriculture, and addressing
22 anticompetitive elements in the supply chain; and (4) trade and travel facilitation. *Id.*
23 at 296. The memorandum “memorializes a preexisting prioritization” scheme that
24 has been “CBP’s policy since [it] w[as] created in 2003.” Pl. Ex. 10 at 203:12–20.

25 The Secretary explained that “[p]rocessing persons without documents re-
26 quired by law for admission arriving at the Southwest Border remains a component
27 of CBP’s mission.” Def. Ex. 3 at 296; *see also* Pl. Ex. 4 at 133:12–18 (CBP “con-
28 tinue[s] to process migrants in the midst of prioritizing all these different things.”).

1 “[B]ut priority should be given to the efforts described above in the prescribed order.
2 Field leaders have the discretion to allocate resources and staffing dedicated to any
3 areas of enforcement and trade facilitation not covered by the above priorities and
4 queue management process based on the availability of resources and holding ca-
5 pacity at the local port level. Depending on port configuration and operating condi-
6 tions, [DFOs] may establish and operate physical access controls at the borderline,
7 including as close to the U.S.-Mexico border as operationally feasible. DFOs may
8 create lines based on legitimate operational needs, such as lines for those with ap-
9 propriate travel documents and those without such documents. As in all operations
10 the safety of employees and the public is paramount in operational decisions.” Def.
11 Ex. 3 at 296.

12 Before issuing the June 5, 2018 memo, DHS considered the impact of priori-
13 tization-based queue management on both staffing and daily intake. [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED] Pl. Ex. 96 at 009.

22 Thus, under the June 5, 2018 memo, when determining whether and when to
23 conduct metering, ports were to consider not only the detention and processing ca-
24 pacity factors noted above, but also other operational factors, and were to avoid al-
25 locating resources away from priority mission sets. Accordingly, CBP officials be-
26 gan to more frequently refer to the ports’ capacity to process inadmissible aliens in
27 terms of “operational capacity.” *E.g.*, Pl. Ex. 99 at 864 (OFO “shifted from ‘deten-
28

tion’ capacity to ‘operational’ capacity” after June 5, 2018). “The operational capacity at a POE varies depending on overall port volume, facility capacity, resource constraints, and daily tactical and enforcement activities. Operational impact at POEs cannot always be planned; for example, [OFO] do[es] not know in advance when [it] will discover human, narcotics, or weapons smuggling attempts, or which individuals may present a threat to our officers. It takes significant resources to manage this highly variable environment.” Def. Ex. 61 at 279. There are “a lot of factors that go into operational capacity.” Pl. Ex. 14 at 286:9–10. Operational capacity turns “primarily [on] what else is going on at the port,” including “other mission sets that [the port] ha[s] to fulfill,” like “immigration secondary processing, drug seizures, money seizures, weapons seizures,” or “trade processing,” *id.* at 286:25–287:1, 288:13–21; “how much physical space is available,” which turns on a calculation of the port’s “holding capacity” or “detention capacity” and “how many people [the port] already ha[s] in custody,” *id.* at 287:2–7; “the type and the makeup of the cases,” such as “whether or not they are migrant cases or other types of admissibility cases” and “the complexity of the cases,” *id.* at 287:25–288:2, 287:3–4, 289:1; and the number of “people that [the port] ha[s] to dedicate to the other mission sets,” *id.* at 288:22–25; *see also* Pl. Ex. 102 at 222:16–24.

OFO does not regularly quantify, record, or report the ports’ operational capacity, let alone its specific operational capacity to process aliens without entry documents. It “would just be too cumbersome to record every event that’s taking place in the port through out [*sic*] the day, which has had an impact on how many migrants we could come across. If a port was working multiple simultaneous seizures, and then we had to pull officers to do that, we wouldn’t record all of those activities. It’s just too cumbersome of a report to come together for the 46 crossings along the southwest border as to what’s taking place.” Pl. Ex. 10 at 186:11–21; *see also* Pl. Ex. 102 at 66:13–14. “And,” operational capacity “is fluid” and “differs from port to port and from day-to-day.” Pl. Ex. 10 at 186:11–12, 186:22–187:3. “There may

1 be no capacity at 9:00 a.m, but [ICE] ERO comes and picks folks up at 11:00. And
2 at 12 o'clock we have capacity." *Id.* at 186:22–187:3.

3 OFO has used "operational capacity" as a metric for port operations in the
4 past. *E.g.*, Def. Ex. 62 at 712 (Sept. 14, 2016 report from CBP's Incident Manage-
5 ment Division: "The current influx of inadmissible aliens coupled with added ad-
6 ministrative functions and decreased operational capacity due to construction has
7 created an untenable situation for which ERO assistance is critical."); Pl. Ex. 17 at
8 70:4–13 ("[F]or as long as I have worked in detention as a manager, going back to
9 '15–'16, we have always used operational capacity.").

10 On June 16, 2018, the Migration Crisis Action Team (MCAT) Deputy Com-
11 mander reported to ICE that "all the ports along the SWB [southwest border] will
12 increase their daily intake. The ports will not go beyond their capacity limits but will
13 get as close as possible without negatively impacting their other responsibilities.
14 This will result in a significant increase of referrals of FMUAs and single adults [to
15 ICE]." Def. Ex. 63 at 555. Another member of the MCAT "convey[ed]" this infor-
16 mation to the ICE field offices on the southwest border to "ensure ERO is ready to
17 support all facets of [the] mission." *Id.*

18 Between June 26 and July 3, 2018, a CBP officer in the San Diego Field Office
19 "worked toward gauging the overall sentiment of subjects detained at" the San
20 Ysidro Port of Entry. Pl. Ex. 107 at 2. His "goal was to determine what effect, if
21 any," measures "such as ... metering" were having "on subjects attempting entry ei-
22 ther illegally or through the credible fear/asylum process." *Id.* (quotation marks
23 omitted). The officer "assess[ed]" that the Mexican, Honduran, El Salvadorian and
24 Guatemalan citizen sentiment detained at the POE is unshaken. Detainees did not
25 claim ... long wait times in Mexico as deterrent factors." *Id.*

26 On August 6, 2018, the MCAT Deputy Commander asked "[h]ow many cases
27 SYS [could] process a day if ERO moved them out the next day." Pl. Ex. 112 at 802.
28 The Watch Commander overseeing San Ysidro's AEU responded [REDACTED] but

only if “half of the officers” were not already at their overtime cap. *Id.*³ The Deputy Commander indicated that he would not recommend that solution because “throw[ing] money at” the problem “would defeat the purpose of queue management.” *Id.*

G. CBP Issues the Prioritization-Based Queue Management Memorandum.

From FY 2018 to FY 2019, the number of inadmissible arriving aliens processed by the southwest border Field Offices continued to creep upwards, and the proportion of those inadmissible arriving aliens who were placed into expedited removal and referred for a credible-fear interview doubled again. In FY 2018, those Field Offices processed 124,879 inadmissible arriving aliens, 38,399 of whom were referred for a credible-fear interview. Def. Ex. 4 at 2. In FY 2019, those Field Offices processed 126,001 inadmissible arriving aliens, 80,055 of whom were referred for a credible-fear interview. *Id.*

In late November 2019, CBP determined that OFO should renew its focus on directing its resources toward the priority mission sets. *See* Def. Ex. 67 at 15–16. On November 27, 2019, Mark Morgan, the Acting CBP Commissioner issued a memorandum to the OFO Executive Assistant Commissioner with the subject “Prioritization-Based Queue Management.” Def. Ex. 5. The Acting Commissioner cited the sustained increase in the number of inadmissible aliens presenting at ports of entry and the substantial resources their processing requires, and stated that “CBP must carefully balance its space and resources to ensure that each POE has sufficient capacity to address its mission sets, in order of priority, including the safety and expeditious processing of all travelers accessing the port.” *Id.* at 303. The Acting Commissioner explained that Secretary Nielsen previously instructed the southwest border Field Offices to structure their staffing and resources to accomplish four priority

³ On August 7, 2018, San Ysidro reported that over the preceding 60 days, it averaged █ intakes per day, processed █ cases per day, and █ individuals were moved from the Port per day. Pl. Ex. 92 at 964.

mission sets. *See id.* at 303–04. In Fiscal Year 2019, while the Nielsen memorandum was in effect, CBP officers at the southwest border ports of entry arrested 1,800 convicted criminals, encountered 1,601 Special Interest Aliens,⁴ and found three individuals on the terrorist watchlist. *Id.* at 304. CBP officers at the ports seized 19% more methamphetamine and 58% more fentanyl by weight and interdicted \$2.4 million more in outbound currency than the previous fiscal year. *Id.* Accordingly, the Acting Commissioner reiterated that “field leaders must continue to balance resources according to the order of priority listed above,” *i.e.*, national security efforts, counter-narcotics and outbound operations, economic security, and trade and travel facilitation. *Id.* at 305.

ARGUMENT

I. Plaintiffs Lack a Private Right of Action to Enforce the INA.

Defendants are entitled to summary judgment on Claim I for purported independent violations of the INA (*see* SAC ¶¶ 244–55) because Plaintiffs lack a private right of action under the INA. *New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1166 (D. N.M. 2020) (the INA “does not provide a private right of action” to litigants seeking to enforce its terms); *Ms. L. v. ICE*, 302 F. Supp. 3d 1149, 1168 (S.D. Cal. 2018) (dismissing claim under § 1158 because “it is unclear to the Court whether Plaintiffs have a private right of action under the Asylum Statute”). As this Court recognized, “[w]hile a right to judicial review of agency action may be created by a separate statutory or constitutional provision, once created it becomes subject to the judicial review provisions of the APA unless specifically excluded.” *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1316 (S.D. Cal. 2018) (brackets in original;

⁴ A Special Interest Alien is “a non-U.S. person who, based on an analysis of travel patterns, potentially poses a national security risk to the United States or its interests.” <https://www.dhs.gov/news/2019/01/07/mythfact-known-and-suspected-terrorist-special-interest-aliens> (last visited Sept. 25, 2020).

1 citation and quotation marks omitted). “Insofar as [Plaintiffs] have such an entitle-
 2 ment under the INA and its implementing regulations, Plaintiffs may obtain all the
 3 relief they request under the provisions of the APA.” *Id.* (quotation marks omitted).
 4 This Court should thus grant summary judgment for Defendants on Claim I.

5 **II. Defendants Have Not Taken Discrete and Final Agency Action of the Sort**
 6 **Plaintiffs Contend.**

7 **A. There is No Discrete “Turnback Policy.”**

8 Plaintiffs in their APA claims challenge “the turnback policy,” a purported
 9 “overarching agency policy directing th[e] unlawful withholding of mandatory ac-
 10 tion” under 8 U.S.C. §§ 1158 and 1225. Pl. MSJ 19, 21; *see also id.* at 7–16, 19–21.
 11 Defendants are entitled to summary judgment on these claims because “the turnback
 12 policy,” as Plaintiffs describe it, is not sufficiently discrete for APA review.

13 “The APA authorizes suit by ‘[a] person suffering legal wrong because of
 14 agency action, or adversely affected or aggrieved by agency action within the mean-
 15 ing of a relevant statute.’” *Norton*, 542 U.S. at 61 (brackets in original; quoting
 16 5 U.S.C. § 702). “[A]gency action” is defined in § 551(13) to include ‘the whole or
 17 a part of an agency rule, order, license, sanction, relief, or the equivalent or denial
 18 thereof, or failure to act.’” *Id.* at 62 (brackets in original; emphasis omitted). These
 19 are “circumscribed, discrete agency actions, as their definitions make clear.” *Id.*
 20 APA challenges can succeed only where the plaintiff “identif[ies] a discrete ‘agency
 21 action’ that fits within the APA’s definition of that term” *Wild Fish Conservancy v.*
 22 *Jewell*, 730 F.3d 791, 801 (9th Cir. 2013) (citations omitted). It is “entirely certain”
 23 that an “entire ‘program’—consisting principally of the many individual actions ref-
 24 erenced in the complaint, and presumably actions yet to be taken as well—cannot be
 25 laid before the courts for wholesale correction under the APA.” *Lujan v. Nat’l Wild-*
 26 *life Fed’n*, 497 U.S. 871, 892–93 (1990). “A plaintiff may not simply attach a policy
 27 label to disparate agency practices or conduct” to satisfy the APA’s discrete agency
 28 action requirement. *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1207. They must identify

1 an actual government policy. *See Lightfoot v. District of Columbia*, 273 F.R.D. 314,
2 326 (D.D.C. 2011).

3 The “turnback policy,” as Plaintiffs describe it, is not a “circumscribed, dis-
4 crete” agency action. *Norton*, 542 U.S. at 62. It comprises many claimed actions or
5 decisions spanning several years that have different factual bases. These purported
6 various disparate actions include: the San Ysidro Port of Entry purportedly “aban-
7 don[ing]” its surge contingency plans in May 2016 and “turning back asylum seekers
8 instead,” Pl. MSJ 8; OFO “turning back asylum seekers” at the Calexico Port of
9 Entry in September 2016, supposedly with knowledge that there were “multiple in-
10 vestigations” into the policy’s legality, *id.* at 9; DHS and CBP deciding “[w]ithin
11 hours” of the 2016 presidential election “not to open” a temporary processing facility
12 in El Centro, California and expanding metering to Texas ports of entry, *id.* at 10;
13 DHS and CBP “plac[ing] the planned Nogales[, Arizona] processing center on hold”
14 “within a week of the 2016 presidential election” and electing instead “to expand
15 turnbacks” border-wide, *id.* at 11; the government “return[ing]” “asylum seekers
16 standing on U.S. soil” to Mexico in November and December 2017, *id.* at 11, 12; a
17 CBP officer at a Texas port of entry allegedly “cross[ing] into Mexican territory to
18 keep a migrant from coming onto U.S. soil”⁵ in June 2018, *id.* (quoting Pl. Ex. 75
19 at 272); the Hidalgo Port of Entry purportedly “intentionally remov[ing] seats from
20 the secondary inspection area to reduce the number of asylum seekers processed at
21 the port,” *id.* at 11 (quotation marks omitted); the OFO Executive Assistant Com-
22 missioner issuing metering guidance in April 2018, *id.* at 12–14; and DHS and CBP
23 “adopt[ing] the prioritization-based queue management policy” in June 2018 and
24 “using ‘operational capacity’ as [their] stated metric to justify turning back asylum
25

26 ⁵ This statement is inadmissible hearsay. *See* Fed. R. Civ. P. 56(c)(2). It was made
27 by an individual who has not testified or submitted a declaration, Pl. Ex. 75 at 272,
28 and Plaintiffs offer it for the truth of the matter asserted, *i.e.*, that an officer crossed
the border to prevent a migrant from coming onto U.S. soil.

1 seekers,” *id.* at 14.

2 Plaintiffs do not provide a sound representation of the facts. *See supra* at Facts
3 §§ B–G. But in any event, this constellation of actions grouped together under the
4 banner of “the turnback policy” is not a “‘discrete’ action[] by an agency” amenable
5 to APA review. *Bark v. U.S. Forest Service*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014)
6 (quoting *Norton*, 542 U.S. at 63). In fact, there is no “turnback policy.” The reference
7 appears only in litigation documents, and Plaintiff Al Otro Lado inexplicably has no
8 memory of where the term came from. *See* Pl. Ex. 113 at 121:11–126:11. The “turn-
9 back policy” is “simply the name by which” Plaintiffs “refer[] to the continuing (and
10 thus constantly changing) operations of” CBP at the southwest border ports of entry.
11 *Lujan*, 497 U.S. at 890. “It is no more an identifiable ‘agency action’—much less a
12 ‘final agency action’—than a ‘weapons procurement program’ of the Department of
13 Defense or a ‘drug interdiction program’ of the Drug Enforcement Administration.”
14 *Id.*; *see, e.g., Wild Fish Conservancy*, 730 F.3d at 801 (government’s operation of
15 dams “in a manner that obstructs fish passage” is “not ... a discrete ‘agency action’”).

16 Nor is there any evidence connecting these disparate actions to a single agency
17 policy. To the contrary, the evidence shows that many of these actions were *against*
18 government policy and that the agency took steps to correct them. *E.g.*, Def. Ex. 2
19 (“Once a traveler is in the United States, he or she must be fully processed.”); Def.
20 Ex. 64 at 294–95 (finding the “misconduct” described in Pl. Ex. 8 to be “very seri-
21 ous” and “not in compliance” with CBP policy and suspending the officer for 30
22 days); Def. Ex. 37 at 927 (on Nov. 18, 2016, OFO immediately began “working with
23 the” El Paso and Hidalgo POEs “to address” use of appointments and metering on
24 U.S. soil). Plaintiffs say that CBP officers “lied to” asylum seekers, Pl. MSJ 5, “co-
25 erced some to withdraw their applications for admission” through the use of “stream-
26 lined withdrawal” procedures, *id.*, and “used physical force to turn back others,” *id.*,
27 as part of a “widespread pattern and practice” sanctioned by DHS and CBP leader-
28 ship “of denying asylum seekers access to the asylum process at POEs on the U.S.-

Mexico border,” SAC ¶ 2. But even if those allegations were true, the evidence does not show they were part of or pursuant to any border-wide policy or practice that “is common to the class.” *Lightfoot*, 273 F.R.D. at 326. At *most*, Plaintiffs’ Exhibits show that “lies” occurred at the Tecate and Hidalgo POEs, *see* Pl. Ex. 1 at 99:25–101:6 (testimony of Tecate CBP officer), *and* Pl. Ex. 3 at 145:3–7 (testimony of Hidalgo CBP officer); and that “coercion” or “physical force” was used at the San Ysidro POE, *see* Pl. Ex. 7 at 611 (email to San Ysidro CBP officers regarding streamlined withdrawal procedures), *and* Pl. Ex. 8 at 042 (CBP OPR report relating to a single incident at San Ysidro). The evidence does not show any border-wide “turnback policy,” nor is there any evidence of a border-wide policy, instruction, or guidance that links these disparate actions together. The challenged “turnback policy” is not sufficiently discrete to permit review under the APA.

B. The Border-Wide Metering Decisions are Not Final Agency Action.

Besides being sufficiently discrete, a challenged agency action must be “final.” 5 U.S.C. § 704; *Navajo Nation v. Dept. of the Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017). Agency action is final when it “mark[s] the consummation of the agency’s decisionmaking process” and is an action “by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations and quotation marks omitted). “The general rule” under the second *Bennett* prong is that agency action must “impose an obligation, deny a right, or fix some legal relationship” to be final. *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990) (quotation marks omitted).

While Defendants’ border-wide metering decisions may be discrete and mark the consummation of the decisionmaking process, none are “final” under *Bennett* because they do not “give[] rise to direct and appreciable legal consequences” as to the Plaintiff class. *Hawkes*, 136 S. Ct. at 1814 (quotation marks omitted). The metering decisions do not compel or obligate class members to take a particular action, do not deny class members any rights, and do not fix the legal relations between the

1 parties. An alien who is subject to metering is in the same legal position that he
 2 would be in if he were never subject to metering. He still may cross the border into
 3 a port of entry (albeit at a later date), and when he “is physically present in the United
 4 States or [] arrives in the United States,” he “may apply for asylum in accordance
 5 with” the INA and its implementing regulations. 8 U.S.C. § 1158(a)(1).

6 Plaintiffs’ arguments to the contrary (at Pl. MSJ 20–21) lack merit. *First*, me-
 7 tering does not alter or change existing statutory entitlements or duties. Defendants
 8 acknowledge that this Court previously held that certain aliens who are outside the
 9 United States but are “in the process of arriv[ing] in” the country fall within the
 10 scope of the asylum statute, *Al Otro Lado*, 394 F. Supp. 3d at 1200, but respectfully
 11 maintain their position that §§ 1158 and 1225 by their terms do not apply to class
 12 members outside the United States, *see infra* Argument § III. Even if class members
 13 were within the scope of the statutes, Defendants’ policies have not “den[ied] them
 14 access to the asylum process.” Pl. MSJ 20–21. Plaintiffs identify no direct order to
 15 “deny access,” and class members continue to be referred for asylum processing.
 16 Def. Ex. 4 at 2. If Plaintiffs are correct that “[m]any” class members are “ultimately
 17 deprived” of the opportunity to apply for asylum in the United States, Pl. MSJ 21,
 18 this is not a direct legal consequence of the metering decisions, *see* Roberto Doe
 19 Decl. ¶ 6 (ECF No. 390-75) (detention by Mexico); Roberto Doe Decl. ¶ 7 (ECF No.
 20 390-97) (deportation by Mexico). *Second*, Plaintiffs assert that queue management
 21 is final because it has an “actual or immediately threatened effect,” namely, class
 22 members being “forced to wait” in Mexico. Pl. MSJ 21 (quoting *Lujan*, 497 U.S. at
 23 894). But whether agency action has an “actual or immediately threatened effect”
 24 goes to whether a claim is ripe, not whether it is final. *Lujan*, 497 U.S. at 894 (citing
 25 *Gardner v. Toilet Goods Ass’n, Inc.*, 387 U.S. 158, 164–66 (1967)). Waiting in Mex-
 26 ico may be an immediate and practical effect of queue management, but it is not a
 27 legal consequence. *See Cal. Communities Against Toxics v. EPA*, 934 F.3d 627, 637
 28 (D.C. Cir. 2019) (“pragmatic” inquiry looks to consequences of agency action “as a

1 result of the specific statutes and regulations that govern it”). Plaintiffs fail to chal-
 2 lenge any discrete and final agency action. Therefore, Defendants are entitled to
 3 summary judgment on Plaintiffs’ APA claims.

4 **III. Defendants Have Not “Direct[ed] CBP Officers to Unlawfully Withhold**
 5 **a Discrete, Mandatory Ministerial Action.”**

6 For two reasons, Defendants are entitled to summary judgment on Plaintiffs’
 7 claim that Defendants “direct[ed] CBP officers to unlawfully withhold a discrete,
 8 mandatory ministerial action” under §§ 1158 and 1225 in violation of the APA,
 9 § 706(1). Pl. MSJ 21–23. *First*, § 706(1) requires Plaintiffs to show “that an agency
 10 failed to take a *discrete* agency action that it is *required* to take.” *Norton*, 542 U.S.
 11 at 64; *Hells Canyon Preservation Council v. U.S. Forest Service*, 593 F.3d 923, 932
 12 (9th Cir. 2010). Defendants respectfully maintain that §§ 1158 and 1225 do not man-
 13 date any actions toward aliens who are outside the United States. Section 1158(a)(1)
 14 allows an alien to apply for asylum if he “is physically present in the United States”
 15 or “arrives in the United States.” Section 1225(a)(3) requires the government to in-
 16 spect for admission “[a]ll aliens ... who are applicants for admission or otherwise
 17 seeking admission or readmission to or transit through the United States.” Section
 18 1225(a)(1) defines an applicant for admission as “[a]n alien present in the United
 19 States who has not been admitted or who arrives in the United States,” and regula-
 20 tions require anyone who is seeking admission to do so “at a U.S. port-of-entry,” all
 21 of which are in the United States, *United States v. Aldana*, 878 F.3d 877, 880–82
 22 (9th Cir. 2017), *cert. denied* 139 S. Ct. 157 (2018), “when the port is open for in-
 23 spection,” 8 C.F.R. § 235.1(a). Section 1225(b)(1)(A)(ii) requires the government to
 24 refer for a credible-fear interview an alien “who is arriving in the United States,”
 25 “[i]f” it “determines” that the alien is inadmissible on certain grounds “and the alien
 26 indicates either an intention to apply for asylum” or fear.

27 Sections 1158 and 1225 apply exclusively to aliens “in the United States.”
 28 This reading is supported by: (1) the statutes’ present-tense language, *see DHS v.*

1 *Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (“[w]hen an alien arrives at a port of
 2 entry ... the alien is on U.S. soil”); *United States v. Balint*, 201 F.3d 928, 933 (7th
 3 Cir. 2000); (2) the definition of the word “arrive,” which means “to reach a destina-
 4 tion,” *The American Heritage Dictionary of the English Language* 102 (3d ed. 1992);
 5 (3) the presumption against extraterritoriality, *see Morrison v. Nat’l Australia Bank*
 6 *Ltd.*, 561 U.S. 247, 255, 261 (2010) (“When a statute gives no clear indication of
 7 extraterritorial application, it has none.”); (4) the structure of the INA, *see Sale v.*
 8 *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993) (there is “no provision in the
 9 statute for the conduct of such proceedings outside the United States”); *Zadvydas v.*
 10 *Davis*, 533 U.S. 678, 693 (2001) (“The distinction between an alien who has effected
 11 an entry into the United States and one who has never entered runs throughout im-
 12 migration law.”); *Matter of Lewiston-Queenston Bridge*, 17 I. & N. Dec. 410, 413
 13 (BIA 1980) (“when an individual comes to this country by way of an international
 14 bridge, he has ‘landed’ when he touches United States soil”); (5) the rule that “the
 15 words of a statute must be read in their context and with a view to their place in the
 16 overall statutory scheme,” *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (citation
 17 and quotation marks omitted), which here is a scheme for expedited “remov[al] from
 18 the United States,” 8 U.S.C. § 1225(b)(1)(A)(i) (emphasis added); and (6) the legis-
 19 lative history of § 1225, *see* H.R. Rep. No. 104-469, pt. 1, at 175–76 (1996) (an
 20 asylum claim should “be commenced as soon as possible *after* the alien’s arrival in
 21 the U.S.” (emphasis added)).⁶

22 _____
 23 ⁶ The use of the present-progressive tense (“arriving in”) in § 1225(a)(1)(A)(ii) does
 24 not change this conclusion. Even if “arriving in” may refer to a “process of arriving,”
 25 *Al Otro Lado, Inc.*, 394 F. Supp. 3d at 1200, for the reasons discussed, that process
 26 does not begin before an alien crosses the border. Further, the obligation to refer an
 27 alien for a credible-fear interview does not attach until the government “determines”
 28 the alien is inadmissible on certain grounds, 8 U.S.C. § 1225(b)(1)(A)(ii), and that
 determination can occur only once an alien is physically present *in* the United States.
 Nor does the rule against surplusage support a contrary interpretation. Congress

1 This entitles the government to summary judgment on all subclass members’
 2 claims, since by the class definition they did not cross onto U.S. soil “as a result of
 3 Defendants’ metering policy.” ECF No. 513, at 18. Pursuant to that policy, any class
 4 member who is on U.S. soil must be inspected and processed and may not be re-
 5 turned to Mexico. Def. Ex. 2; *supra* Facts §§ B–G; Argument § II.A (failure to pro-
 6 cess aliens on U.S. soil is against CBP policy).

7 *Second*, even if the statutes applied to aliens outside the United States, De-
 8 fendants have not in fact implemented “an overarching agency policy directing th[e]
 9 unlawful withholding of [these] mandatory agency action[s].” Pl. MSJ 21. The un-
 10 disputed evidence shows just the opposite: “Processing persons without documents
 11 required by law for admission arriving at the Southwest Border remains a component
 12 of CBP’s mission.” Def. Ex. 3 at 296; *accord* Def. Ex. 2. Moreover, class members
 13 *are in fact* being processed for asylum. Concurrently with the implementation of
 14 metering, the number of inadmissible arriving aliens referred by the southwest bor-
 15 der Field Offices for credible-fear interviews increased four-and-a-half times over,
 16 from 17,284 in FY 2017 to 80,055 in FY 2019. Def. Ex. 4 at 2. This figure represents
 17 only a subset of class members whom CBP referred for asylum processing, since
 18 some class members would have been placed into full removal proceedings to raise
 19 their claim before an immigration judge. *See* 8 U.S.C. § 1225(b)(2)(A). Even if some

20 _____
 21 wrote § 1225 to ensure that both aliens encountered within the United States (the
 22 alien who “is physically present”) and aliens subject to expedited removal (the alien
 23 “who arrives in”) may apply for asylum, which was an important clarifying measure
 24 included as part of Congress’s enactment of major immigration legislation in 1996.
 25 *See* H.R. Rep. No. 104-828, at 209 (1996) (“[t]he purpose of these provisions is to
 26 expedite [] removal *from* the United States” (emphasis added)). Without such clari-
 27 fying language, Congress would have risked an interpretation of the statute that pre-
 28 cluded arriving aliens from applying for asylum at all, since, under the entry doc-
 trine, “an alien detained after arriving at a port of entry ... is ‘on the threshold’” and
 is treated “‘as if stopped at the border.’” *Thuraissigiam*, 140 S. Ct. at 1983, 1982
 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 215 (1953)).

1 class members ultimately did not enter the United States to seek asylum after being
 2 subject to metering, as Plaintiffs’ contend, *see* Pl. MSJ 21, the fact that “many more
 3 asylum seekers were not denied access” to the asylum process “defeats the inference
 4 that a categorical policy of the nature Plaintiffs intimate exists.” *Al Otro Lado, Inc.*,
 5 327 F. Supp. 3d at 1320–21.⁷ There is no “overarching agency policy directing th[e]
 6 unlawful withholding of mandatory action” under §§ 1158 and 1225. Pl. MSJ 21. At
 7 most, agency action is delayed, and Plaintiffs make no attempt to argue that these
 8 delays are unreasonable. *See id.* at 21–23. Defendants are thus entitled to summary
 9 judgment on Plaintiffs’ § 706(1) claim.

10 **IV. Metering is Statutorily Permissible.**

11 Plaintiffs argue that “[e]ven if” the statutes do not apply to aliens in Mexico,
 12 Defendants’ “policy” nevertheless “contravenes” the “statutory scheme governing
 13 inspection at POEs and exceeds Defendants’ statutory authority” in violation of the
 14 APA, § 706(2). Pl. MSJ 24; *see also id.* at 24–25. This is wrong. Metering is statu-
 15 torily permissible. Defendants are thus entitled to summary judgment on this claim.

16 The government’s border-wide metering decisions—which as discussed are
 17 the only decisions that apply class-wide—are statutorily permissible. In the Home-
 18 land Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), Congress
 19 ordered DHS as its “primary mission” to prevent terrorism in the United States and,
 20 in so doing, “ensure that the functions of the agencies and subdivisions within [DHS]
 21 that are not related directly to securing the homeland are not diminished or neglected
 22 except by a specific explicit Act of Congress.” 6 U.S.C. § 111(b)(1). Congress made

23 ⁷ Plaintiffs cite a Rule 30(b)(6) witness’s statement that, “[i]n her experience[,],”
 24 “asylum seekers who are at the border between the United States and Mexico [are]
 25 attempting to enter the United States at a port of entry.” Pl. MSJ 23 (second brackets
 26 in original; quoting Pl. Ex. 17 at 201:22–202:3). But the witness’s testimony (which
 27 was provided subject to a timely scope objection, Pl. Ex. 17 at 202:1–2) shows at
 28 most that CBP officers understood that those individuals intended to present them-
 selves at the port, not that CBP has a policy to withhold legal obligations. Those
 obligations are being discharged concurrently with metering. *See* Def. Ex. 4 at 2.

1 the Secretary “responsible for” “preventing the entry of terrorists,” “securing the
2 borders [and] ports,” “carrying out the immigration enforcement functions,” “estab-
3 lishing and administering rules” governing “forms of permission ... to enter the
4 United States,” “establishing national immigration enforcement policies and priori-
5 ties,” and, “in carrying out the foregoing responsibilities, ensuring the speedy, or-
6 derly, and efficient flow of lawful traffic and commerce.” *Id.* § 202 (capitalization
7 altered).

8 In the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No.
9 114-125, 130 Stat. 122 (2016), Congress mandated that the CBP Commissioner
10 “shall” “coordinate and integrate [CBP’s] security, trade facilitation, and trade en-
11 forcement functions,” ensure the interdiction of illegal entrants and goods, “facilitate
12 and expedite the flow of legitimate travelers and trade,” “direct and administer
13 [CBP’s] commercial operations” and “enforce[] the customs and trade laws,” “de-
14 tect, respond to, and interdict terrorists, drug smugglers and traffickers, human
15 smugglers and traffickers” and other dangerous persons, “safeguard the borders”
16 against “the entry of dangerous goods,” coordinate with ICE and USCIS to “enforce
17 and administer all immigration laws,” including “the inspection, processing, and ad-
18 mission of persons who seek to enter or depart the United States” and “the detection,
19 interdiction, removal, departure from the United States, short-term detention, and
20 transfer of persons unlawfully entering, or who have recently unlawfully entered,
21 the United States,” and various other functions. 6 U.S.C. § 211(c). In the same Act,
22 Congress ordered the OFO Executive Assistant Commissioner to “coordinate
23 [CBP’s] enforcement activities” at the ports of entry to “deter and prevent terrorists
24 and terrorist weapons from entering,” “conduct inspections at [the] ports of entry to
25 safeguard [against] ... terrorism and illegal entry of persons,” “prevent illicit drugs,
26 agricultural pests, and contraband from entering the United States,” “in coordination
27 with the Commissioner, facilitate and expedite the flow of legitimate travelers and
28

trade,” administer the National Targeting Center, coordinate the agency’s “trade facilitation and trade enforcement activities” with CBP’s Office of Trade, and “carry out other duties and powers prescribed by the Commissioner.” *Id.* § 211(g)(3).

Metering, whether to facilitate safe and orderly processing at the ports of entry, *see* Def. Ex. 2, or to facilitate the prioritization of resources in order of CBP’s national-security, counter-narcotics and outbound-operations, economic-security, and trade-and-travel mission sets, *see* Def. Ex. 3 at 296; Def. Ex. 5 at 303–04, is permissible under this statutory scheme. During the 2016 surge, the physical port facilities at San Ysidro were overrun by the sheer volume of individuals waiting to be processed. *See, e.g.*, Pl. Ex. 41 at 553 (referring to “several hundred people [] sleeping on the floor of the [San Ysidro] pedestrian entrance”). At the same time, CBP was regularly diverting resources from the entire agency to process inadmissible arriving aliens at the southwest border. *See supra* at Argument § B–E; Def. Ex. 9 at 2 (“The practice of temporary details has become so systemic ... that CBP has named it ‘Operation Overflow.’”); Pl. Ex. 33 at 446 (showing more than \$45 million of expenditures in six and a half months). This was at the direct expense of CBP’s obligations (for example) to coordinate and integrate security, trade facilitation, and trade enforcement functions at the ports and to facilitate and expedite the flow of legitimate travelers and trade. 6 U.S.C. § 211(c). Border-wide metering was necessary to CBP’s functioning and performance of its statutory mission and duties.

In 2018, at the beginning of another sustained increase in undocumented migration on the southwest border and when faced with evidence of a forthcoming potential mass influx event, CBP elected to issue border-wide guidance that permits the ports to meter “[w]hen necessary or appropriate to facilitate orderly processing and maintain the security of the port and safe and sanitary conditions for the traveling public.” Def. Ex 2. Then, rather than continuing to expend millions of dollars to address another sustained surge, DHS instructed CBP to prioritize its national-security

1 and other critical missions at the southwest border ports and the use queue manage-
 2 ment procedures to facilitate this prioritization, Def. Ex. 3 at 294–96, and later to
 3 continue operating under this scheme, Def. Ex. 5 at 303–05. This is consistent with
 4 Congress’s elevation of DHS’s national-security function over all others and is a
 5 reasonable exercise of CBP’s “broad discretion” to allocate its limited resources to
 6 accomplish its many statutory functions. *Massachusetts*, 549 U.S. at 527; *Hernandez*,
 7 140 S. Ct. at 746 (“attempting to control the movement of people and goods across
 8 the border” “implicates an element of national security”).

9 Plaintiffs contend that DHS and CBP have “‘abandon[ed]’” § 1225 because
 10 “they think it is not working well,” Pl. MSJ 24 (quoting *E. Bay Sanctuary Covenant*
 11 *v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018)). Not so. CBP prioritizes certain mission
 12 sets over processing undocumented aliens at the southwest border POEs, but the
 13 processing of such individuals continues, Def. Ex. 4 at 2, and it “remains a compo-
 14 nent of CBP’s mission,” Def. Ex. 3 at 296; *see also* Pl. Ex. 4 at 133:12–18.

15 Plaintiffs also contend that “CBP’s general power to operate POEs does not
 16 include authority to contravene more specific provisions of the INA” because the
 17 “specific” provisions of § 1225 “govern[] the general.” Pl. MSJ 25 n.16 (quoting
 18 *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)).
 19 Plaintiffs never specify which “general” statutory provisions they are referring to.
 20 Regardless, this argument ignores that Congress also enacted a detailed statutory
 21 scheme setting forth CBP’s and OFO’s functions at the ports of entry. *See* 6 U.S.C.
 22 §§ 211(c), (g)(3). As part of that scheme, it elevated DHS’s national security func-
 23 tions over all others, including processing undocumented migrants. *Id.*
 24 § 111(b)(1)(A), (E). In all events, the Supreme Court “ha[s] repeated time and again”
 25 that when faced with competing obligations, “an agency has broad discretion to
 26 choose how best to marshal its limited resources and personnel to carry out its dele-
 27 gated responsibilities.” *Massachusetts*, 549 U.S. at 527. CBP continues to discharge
 28 its obligations under § 1225 as it takes individuals from Mexico, *see* Def. Ex. 4 at 2,

1 so the “agency’s decision to prioritize other projects is entitled to great deference,”
2 *Compassion Over Killing v. FDA*, 849 F.3d 849, 857 (9th Cir. 2017).

3 Plaintiffs further contend that “the logical result” of the government’s position
4 is that DHS and CBP “would have sole authority to end asylum for noncitizens ar-
5 riving at POEs, without any involvement by Congress.” Pl. MSJ 25. But none of the
6 government’s border-wide metering decisions permit CBP to do this. The metering
7 decisions are well within the government’s statutory authority.

8 **V. Defendants’ Actions are Not Arbitrary and Capricious.**

9 The undisputed facts also demonstrate that each of Defendants’ relevant de-
10 cisions regarding metering is well-supported by the factual record before the agency,
11 is logical and coherent, and is the product of reasoned decisionmaking. Each deci-
12 sion more than satisfies the narrow and deferential standard for arbitrary-and-capri-
13 cious review. *See Motor Vehicle Mfgs. Ass’n of U.S. v. State Farm Mut. Auto. Ins.*
14 *Co.*, 463 U.S. 29, 43 (1983). Defendants are thus entitled to summary judgment.

15 The APA “requires a reviewing court to uphold agency action unless it is ‘ar-
16 bitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”
17 *San Luis & Delta-Mendota Water Authority v. Locke*, 774 F.3d 971, 994 (9th Cir.
18 2014) (quoting 5 U.S.C. § 706(2)(A)). “Under this standard, [courts] will sustain an
19 agency action if the agency has articulated a rational connection between the facts
20 found and the conclusions made.” *Id.* (quotation marks omitted). The 2016 metering
21 decisions were necessitated by overwhelming numbers of migrants seeking to pre-
22 sent themselves for processing, the resultant overcrowding and unsanitary condi-
23 tions at the ports, and the prolonged diversion of staffing resources from other stat-
24 utory mission sets. *See supra* at Facts §§ B–C. Each later decision by CBP or DHS
25 was made against this factual backdrop, and with consideration of substantiated in-
26 creases in the number of undocumented aliens seeking entry to the United States.
27 Plaintiffs claim that the capacity constraints are exaggerated or nonexistent, and thus
28 “pretextual,” but this is not so. Moreover, Plaintiffs ignore that the stated reasons for

metering include to proactively *avoid* overcrowding and diversion of resources. Def. Ex. 2 (metering to be used when “necessary or appropriate to facilitate orderly processing”); Def. Ex. 5 at 303–05. It is eminently reasonable to act to prevent an operational crisis before one occurs. Further, the evidence shows that queue management in fact facilitated orderly processing: The border Field Offices referred more inadmissible arriving aliens for credible-fear interviews after the metering memoranda were issued. *See* Def. Ex. 4 at 2. Field personnel attribute this to metering “allow[ing them] to prevent emergencies.” Pl. Ex. 102 at 188:18–25.

Plaintiffs nonetheless contend that the “turnback policy” is arbitrary and capricious because it is “based on pretext,” its “true motivations are unlawful,” and it “amounts to an arbitrary and capricious interpretation of the INA.” Pl. MSJ 26, 29, 30 (capitalization altered); *see also id.* at 26–31. Plaintiffs’ arguments are flawed.

A. Defendants’ Border-Wide Actions are Not Based on “Pretext.”

Plaintiffs say that “Defendants’ stated justification for the turnback policy—a ‘lack of capacity’ at POEs—is pretextual.” *Id.* at 26 (quoting Answer ¶ 7). That is not true. The undisputed facts demonstrate that the capacity concerns giving rise to metering—and the resulting overcrowding and diversion of resources—are genuine.

When the San Ysidro Port of Entry began metering in late May 2016, the Port was overwhelmed by individuals seeking admission despite having taken a number of steps to increase its processing and detention capacity, *supra* at Facts § B, which required the Port Director to eventually instruct his deputies to “hold the line the best we can” to enable staff to “process cases and only focus on processing case[s] at this time.” Pl. Ex. 43 at 657. The subsequent instructions to other ports of entry to control the flow of travelers through metering were animated by the same concerns. *See supra* at Facts § C; Pl. Ex. 69 at 935 (“I just want our folks to have an additional tool to keep conditions safe and working at our POEs.”).

Likewise, in April and May 2018, directly preceding the April and June 2018

1 memoranda, the southwest border ports were processing an increased number of in-
 2 admissible arriving aliens and had begun to report “impacts to frontline functions,”
 3 Def. Ex. 50 at 853, and CBP was facing another potential mass migration event, *see*
 4 Pl. Ex. 10 at 68:19–20; Def. Ex. 46 at 4; Def. Ex. 47 at 4; Def. Ex. 48 at 4; Def. Ex.
 5 49 at 4; Def. Ex. 3 at 295–96; Pl. Ex. 80. By the time the CBP Acting Commissioner
 6 issued the prioritization-based queue management memorandum in November 2019,
 7 the number of inadmissible arriving aliens referred by the southwest border Field
 8 Offices for credible-fear screening had doubled again, from 38,399 in FY 2018 to
 9 80,055 in FY 2019. Def. Ex. 4 at 2.

10 Defendants’ capacity justifications are not a “pretext” because *CBP in fact*
 11 *was facing capacity constraints when the government made the border-wide meter-*
 12 *ing decisions.* Even if there were additional reasons for the government’s actions, “a
 13 court may not reject an agency’s stated reasons for acting simply because the agency
 14 might also have had other unstated reasons.” *Dept. of Commerce*, 139 S. Ct. at 2573.⁸
 15 The facts show that the government truthfully “disclose[d] the basis of its action.”
 16 *Id.* (quotation marks omitted).

17 Plaintiffs’ arguments to the contrary (at Pl. MSJ 26–29) lack merit. *First*,
 18 Plaintiffs contend that that the government’s justifications are pretextual because
 19 “POEs generally operated well below 100%” while metering and the numbers “al-
 20 most never impacted port operations.” Pl. MSJ 26. But that is not evidence of pre-
 21 text; it is evidence that the government’s policies work as intended. When metering,
 22

23
 24 ⁸ “Relatedly, a court may not set aside an agency’s policymaking decision solely
 25 because it might have been influenced by political considerations or prompted by an
 26 Administration’s priorities. Agency policymaking is not a ‘rarified technocratic pro-
 27 cess, unaffected by political considerations or the presence of Presidential power.’
 28 Such decisions are routinely informed by unstated considerations of politics, the leg-
 islative process, public relations, interest group relations, foreign relations, and na-
 tional security concerns (among others).” *Dept. of Commerce*, 139 S. Ct. at 2573
 (quoting *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981)).

ports will generally detain fewer people at a time, which in turn allows them to dedicate their resources to their priority missions. *See* Def. Ex. 5 at 303–05 (showing an increase in inbound drug interdictions and currency seizure under the priority scheme). When not metering, there are “impacts to frontline functions,” Def. Ex. 50 at 853, including, for example, lower border-wide drug seizure weights, Def. Ex. 1 ¶ 21, and lines of people waiting to be processed that stretch “clear south into Mexico,” Pl. Ex. 17 at 160:12. Further, as explained, physical detention capacity is only one aspect of a port’s ability to detain individuals, and whether the port can safely detain and orderly process them depends on myriad other factors, including the demographics of the detained population, available staffing and overtime, and the other enforcement actions occurring at the port. That CBP does not continuously max out its detention capacity is not evidence of pretext, nor is it unlawful in any way.

Second, Plaintiffs raise several port-specific examples that purportedly show that Defendants’ capacity concerns are pretextual, but none support Plaintiffs’ argument nor undermine Defendants’ stated reasons for metering. Plaintiffs say that “a CBP officer at the Tecate POE testified that this ‘capacity excuse’ is a lie.” Pl. MSJ 26–27. But testimony from a single first-line officer at Tecate is probative only of what the officer believes occurred at Tecate, not of whether an entire government agency implemented a policy for a pretextual reason. In any event, the officer’s testimony supports the government’s stated reasons for metering, because the officer also testified that if the Port of Tecate were not permitted to meter, it would “back up our operations very fast.” Pl. Ex. 1 at 146:9–18.

Quoting their attorney’s leading questions, Plaintiffs also say that CBP officers at Otay Mesa “were telling travelers that the facility was at capacity but weren’t actually checking on the capacity of the facility.” Pl. MSJ 27 (quoting Pl. Ex. 118, at 93:4–12; *see id.* at 93:9 (objection)). That is inaccurate. The evidence shows that the officers “‘tell travelers they can go to San Ysidro or wait at the limit line,’” Pl. Ex. 118 at 92:18–93:1 (emphasis added), not that limit line officers tell travelers that

the “facility was at capacity” without checking. Regardless of what line officers do, this does not mean that supervisors at the port have not assessed a port’s capacity based on a number of operational considerations.

Again quoting their own attorney’s leading questions, Plaintiffs say that the Hidalgo POE “‘intentionally removed seats’ from the port’s secondary inspection area, ‘so that they could say that [the port] couldn’t process as many people.’” Pl. MSJ 27 (quoting Pl. Ex. 3 at 157:15–18; *see id.* at 156:9, 21 (objections)). But this testimony is inadmissible for lack of foundation and cannot be considered on summary judgment. *See* Fed. R. Civ. P. 56(c)(2). This witness (another first-line CBP officer) was being asked his “opinion,” Pl. Ex. 3 at 156:19–20, and he did not testify that he personally knows port leadership to have removed seats with the intention of processing fewer asylum seekers, *see id.* at 155:19–157:18.⁹ Plaintiffs also incorrectly state that the same officer “testified that there was no justification for metering because CBP could process asylum seekers in the order that they came to a POE without resorting to turnbacks.” Pl. MSJ 27 (quoting Pl. Ex. 3 at 71:9–16). What the officer actually testified was that he “couldn’t see a reason why [CBP] couldn’t” “process asylum seekers in the order that they came to the port of entry.” Pl. Ex. 3 at 71:9–16. This merely shows that this one local officer does not have insight into the government’s border-wide operations and capacity constraints, not that those constraints are false. As explained, those constraints are real.

Third, Plaintiffs say that prior to issuing the June 2018 memorandum, Secretary Nielsen “explicitly asked for and considered the fact that the policy would result in [] turnbacks ... without linking those expected turnback numbers to any actual capacity shortage at POEs.” Pl. MSJ 27 (emphasis removed). That is not accurate. The Secretary’s office asked, “if we fully implement the priority based Que [*sic*]

⁹ The witness also has a self-described “traumatic brain injury,” Pl. Ex. 3 at 179:13–14, and expressed concern with “[his] memory a little bit” when asked about the chairs, *id.* at 157:7–13.

1 Management option—what’s a rough magnitude of the CBP folks that will be
 2 needed to man the boundary line? What’s a rough estimate of the number of folks
 3 that would likely be turned away per day?” Pl. Ex. 93 at 317. Requesting information
 4 about the potential costs and impacts of implementing a policy is a regular aspect of
 5 the policymaking process. It does not show that there were no capacity constraints.

6 *Fourth*, Plaintiffs say that “[i]f there really were capacity issues, Defendants
 7 have long had contingency plans” for mass migration events but “repeatedly de-
 8 clined to implement such plans and in some instances scrapped their rollout.” Pl.
 9 MSJ 27. Plaintiffs ignore that ports *did* implement contingency plans and that De-
 10 fendants engaged in extensive contingency planning in 2016 before authorizing me-
 11 tering border-wide. *See supra* at Facts §§ B–D.¹⁰ But those efforts were insufficient
 12 to prevent overcrowding in the event of a sustained migrant surge and came at the
 13 expense of the government’s other statutory obligations.

14 *Fifth*, Plaintiffs say that the government can simply parole class members
 15 from the ports. Pl. MSJ 27. But mass parole would be manifestly contrary to the
 16 plain language of § 1225, which “mandate[s]” the detention of an alien until his asy-
 17 lum application is adjudicated or he is removed from the United States. *Jennings v.*
 18 *Rodriguez*, 138 S. Ct. 830, 845 (2018). Parole “should not be used to circumvent
 19 Congressionally-established immigration policy.” H.R. Rep. No. 104-469, pt. 1, at
 20 141. In any event, Plaintiffs acknowledge that Defendants attempted this approach
 21 “in fall 2016,” Pl. MSJ 27, but like the other steps taken, it did not solve the problem.

22 *Sixth*, Plaintiffs say that in June 2018, “CBP began using ‘operational capac-
 23 ity,’ as opposed to ‘detention capacity,’” to justify metering, and that this metric
 24
 25

26 ¹⁰ The planned El Centro facility was delayed because of “bed space.” Pl. Ex. 65 at
 27 879. [REDACTED]
 28 [REDACTED] Pl. Ex. 66 at 216. The government would later open two soft-sided facilities in
 Tornillo and Donna, Texas. Def. Ex. 33 at 5.

1 “‘lacks any coherence,’ and is anything but a ‘concrete standard.’” Pl. MSJ 28 (quot-
2 ing *Tripoli Rocketry Ass’n v. ATF*, 437 F.3d 75, 77 (D.C. Cir. 2006)). This is wrong.
3 CBP used “operational capacity” long before June 2018. *E.g.*, Def. Ex. 62 at 712
4 (Sept. 2016); Pl. Ex. 17 at 70:4–13 (2015–16). While operational capacity may not
5 be quantifiable, that does not make it arbitrary and capricious. Operational capacity
6 is an established metric in detention contexts. *See Coleman v. Schwarzenegger*, 922
7 F. Supp. 2d 882, 921 (N.D. Cal. 2009) (“A prison system’s capacity is not defined
8 by square footage alone; it is also determined by the system’s resources and its abil-
9 ity to provide inmates with essential services such as food, air, and temperature and
10 noise control.”); DOJ, Bureau of Justice Statistics, [https://www.bjs.gov/index.cfm?](https://www.bjs.gov/index.cfm?ty=tdtp&tid=1)
11 [ty=tdtp&tid=1](https://www.bjs.gov/index.cfm?ty=tdtp&tid=1) (defining “operational capacity” as “[t]he number of inmates that can
12 be accommodated based on a facility’s staff, existing programs, and services”).

13 *Seventh*, it is not true that the purported “shift to ‘operational capacity’ simply
14 resulted in POEs processing ‘fewer immigrants.’” Pl. MSJ 28 (quoting Pl. Ex. 100
15 at 207:7–14; *see also id.* at 207:12–13 (objection)). From FY 2018 (when Plaintiffs
16 say that CBP was not using operational capacity) to FY 2019 (when Plaintiffs say
17 that CBP was using operational capacity), the border Field Offices maintained their
18 overall levels of inadmissible-alien processing, and their credible-fear referrals more
19 than doubled. Def. Ex. 4 at 2. Further, the border Field Offices’ inbound drug sei-
20 zures and currency interdictions increased following the Secretary’s memorandum,
21 Def. Ex. 5 at 304, which shows that the Secretary’s memorandum had its intended
22 effects on CBP’s priority mission sets.

23 *Finally*, Plaintiffs say that “after June 2018, POEs set arbitrary numerical caps
24 on asylum seeker processing” below “actual capacity.” Pl. MSJ 29. But again, more
25 class members were referred for asylum processing overall. Def. Ex. 4 at 2. As one
26 Assistant Port Director explained, his port was “able to process more with metering”
27 in 2019 “because metering allowed [CBP] to prevent emergencies,” like those “that
28 occurred in 2016.” Pl. Ex. 102 at 188:18–25. Metering is not pretextual.

B. The “True Motivations” for Metering are Lawful.

Plaintiffs say that metering has an unlawful “[t]rue [m]otivation,” Pl. MSJ 29; *id.* at 29–30, but this argument is flawed for several reasons. *First*, arbitrary-and-capricious review “is ordinarily limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record.” *Dept. of Commerce*, 139 S. Ct. at 2573; *see San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 992 (collecting cases). This rule “reflects the recognition that further judicial inquiry into ‘executive motivation’ represents ‘a substantial intrusion’ into the workings of another branch of Government and should normally be avoided.” *Dept. of Commerce*, 139 S. Ct. at 2573 (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977)). As explained above, the government’s border-wide metering decisions easily satisfy this test when evaluated against the evidence before the agency when the decisions were made. *Supra* at Facts §§ B–G; Argument § V.A. The decisions are “within the bounds of reasoned decisionmaking,” and this Court should not “improperly substitute[] its judgment for that of the agency.” *Dept. of Commerce*, 139 S. Ct. at 2569, 2570 (quotation marks omitted).

Second, even if this Court were to look behind the government’s explanations, Plaintiffs offer no direct evidence that the “true motivation” for metering is to “limit access to the asylum process at POEs for its own sake.” Pl. MSJ 29. The metering memoranda address the constraints on Defendants’ capacity to process undocumented aliens, not just asylum-seekers. *See* Def. Ex. 2; *supra* at Argument § V.A. Further, border-wide metering has not resulted in reduced numbers of asylum seekers, as the southwest border Field Offices’ credible-fear referrals doubled following the 2018 memoranda’s implementation. Def. Ex. 4 at 2.

Third, Plaintiffs’ circumstantial evidence falls well short of showing that Defendants “proceeded with the turnback policy in pursuit of” limiting asylum “for its own sake.” Pl. MSJ 30. Plaintiffs say that CBP Deputy Commissioner McAleenan, “who ultimately proposed the turnback policy, lament[ed] in mid-2016 that there

1 was ‘no appetite to try and refuse [asylum seekers] and push them back to Mexico.’”
 2 *Id.* at 30 (quoting Pl. Ex. 47 at 116; alteration in Pl. MSJ). But the Deputy Commis-
 3 sioner was not referring to “asylum seekers,” he was referring to the Haitian nation-
 4 als, whom UNHCR “confirmed” were mostly “not seeking asylum.” Pl. Ex. 12 at
 5 741. Moreover, Mr. McAleenan was not “lamenting”; he was discussing potential
 6 policy proposals within a broader discussion about regional migration patterns and
 7 international coordination. Pl. Ex. 47 at 116. He would later authorize metering be-
 8 cause he “just want[ed] our folks to have an additional tool to keep conditions safe
 9 and working at our POEs.” Pl. Ex. 69 at 935. This does not show an intent to deter
 10 asylum processing for its own sake. But even if it did, that would not show an APA
 11 violation, particularly because “a court may not set aside an agency’s policymaking
 12 decision solely because it might have been influenced by political considerations or
 13 prompted by an Administration’s priorities.” *Dept. of Commerce*, 139 S. Ct. at 2573.

14 *Fourth*, Plaintiffs say that a deterrence motive exists because [REDACTED]

15 [REDACTED]
 16 [REDACTED] Pl. MSJ 30. [REDACTED]

17 [REDACTED] Pl. Ex. 96 at 009. This shows that the
 18 purpose of the request was to gather information about the policy’s anticipated costs
 19 and effects, which is a normal aspect of policymaking.

20 *Fifth*, Plaintiffs say that in November 2016, “CBP put out a call for proposals
 21 ‘that would have a deterrent effect on the sending populations.’” Pl. MSJ 30. But a
 22 call for proposals that deter people from making the dangerous journey to the United
 23 States is not a call for proposals to deter people from seeking asylum. Indeed, most
 24 of the Haitian population seeking admission at San Ysidro at the time were not asy-
 25 lum seekers, but rather were seeking to work or reunite with family. Pl. Ex. 12 at
 26 741. There is nothing unlawful about seeking policy solutions to irregular migration.

27 *Finally*, even if the evidence showed that Defendants implemented metering
 28 to deter individuals from accessing the asylum process for its own sake, Defendants

respectfully maintain their position that this would not be contrary to the statute or unlawful. *See, e.g., Thuraissigiam*, 140 S. Ct. at 1964–67; H.R. Rep. No. 104-469, pt. 1, at 1; *cf. Jean v. Nelson*, 472 U.S. 846, 880 (1985) (Marshall, J., dissenting) (noting “the valid immigration goal of reducing the number of undocumented aliens arriving at our borders”). Further, IIRIRA was motivated by “legitimate concerns” that the government’s “capacity for admitting, assimilating, and naturalizing immigrants ha[s] been strained by current levels of legal immigration,” including increases attributable to the 1980 Refugee Act. H.R. Rep. No. 104-469, pt. 1, at 133. If Defendants had a “deterrence” motive, that would not be inconsistent with § 1225.

C. Metering is Consistent with Congressional Intent.

Plaintiffs argue that metering “is ‘inconsistent with clearly expressed congressional intent’ because it ‘turns asylum seekers back to danger en masse.’” Pl. MSJ 30 (quoting *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1273 (9th Cir. 2020)); *see also id.* at 30–31. This is wrong. *First*, Plaintiffs do not identify any “clear[]” statutory language evidencing that Congress did not intend for asylum seekers to wait in Mexico. *See E. Bay*, 950 F.3d at 1273 (citing *United States v. City of Fulton*, 475 U.S. 657, 666–67 (1986)). Nor could they. Section § 1225 applies by its terms to aliens “in the United States.” Further, Congress included in § 1225 a provision expressly permitting the government to “return [an] alien” “who is arriving on land ... from a foreign territory contiguous to the United States” back “to that territory pending” full removal proceedings. 8 U.S.C. § 1225(b)(2)(C). Congress did not object to asylum seekers waiting in Mexico.

Second, policies that authorize metering to facilitate safe and orderly processing, Def. Ex. 2, or the prioritization of specific statutory functions, Def. Ex. 5 at 303–04; *see also* Def. Ex. 3 at 294–96, are consistent with the relevant Acts of Congress. As explained, the Homeland Security Act, IIRIRA, and the Trade and Travel Facilitation Act prioritize DHS’s national-security mission over all others and require CBP to facilitate the flow of legitimate travel and trade. Metering is consistent

with the Acts because it facilitates these functions. The government is entitled to summary judgment on Plaintiffs' APA claims because the challenged metering decisions are well-supported, are the product of reasoned decisionmaking, and are consistent with congressional intent.

VI. Metering Does Not Deprive Class Members of Procedural Due Process.

On their due-process claims (at Pl. MSJ 31–33), Plaintiffs first contend that Defendants have deprived class members of their statutory “procedural protections” to “be inspected and processed for asylum at POEs pursuant to § 1225.” Pl. MSJ 32. But § 1225 does not establish any such protections for aliens outside the United States. *Supra* at Argument § III. Nor does the obligation to refer an alien for a credible-fear interview attach until the government “determines” that an alien is inadmissible on certain grounds, which does not occur until an alien is physically present *in* the United States. 8 U.S.C. § 1225(b)(1)(A)(ii). By seeking to compel inspection and processing, class members seek to compel entry to the United States, which is not provided by the statute or the Constitution. “[I]t is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution.” *AID v. All. for Open Soc. Int’l*, 140 S. Ct. 2082, 2086 (2019) (collecting cases); *Zadvydas*, 533 U.S. at 693. Thus, Defendants do not violate any claimed due-process interest by subjecting class members to metering.

Plaintiffs argue “[i]n addition” that metering violates the due-process requirement of “fundamental procedural fairness” toward class members. Pl. MSJ 32–33. It is unclear what Plaintiffs seek by raising this “addition[al]” argument, but in all events class members cannot obtain more than what the statute already provides: to be inspected and processed for admission. *Thuraissigiam*, 140 S. Ct. at 1983 (arriving alien “has only those rights regarding admission that Congress has provided by statute,” and “the Due Process Clause provides nothing more”); *Mezei*, 345 U.S. at 215; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); *Rafedie*

1 v. *INS*, 880 F.2d 506, 520 (D.C. Cir. 1989).¹¹

2 **VII. Plaintiffs’ International-Law Claim is Not Actionable.**

3 Plaintiffs’ claim under the ATS, 28 U.S.C. § 1350, is not actionable. *See* Pl.
 4 MSJ 33–36. *First*, Plaintiffs fail to show why this Court should use its restricted
 5 power to create federal common law to fashion a cause of action for injunctive and
 6 declaratory relief against the United States for purported violations of the non-re-
 7 foulement obligation. The “three primary offenses” cognizable under the ATS in-
 8 clude “violation of safe conducts, infringements of the rights of ambassadors, and
 9 piracy.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). While courts in certain
 10 circumstances may create a cause of action for an additional offense that would in-
 11 corporate a “specific, universal, and obligatory” international-law standard, *id.* at
 12 732, courts must exercise “great caution in adapting the law of nations to private
 13 rights,” *id.* at 728, and engage in “vigilant doorkeeping,” *id.* at 729.

14 The non-refoulement obligation is binding on the Executive only by statute
 15 and regulation. *See* 8 U.S.C. § 1231(b)(3)(A) (prohibiting the government from “re-
 16 mov[ing] an alien to a country if the Attorney General decides that the alien’s life or
 17 freedom would be threatened in that country” on a protected ground); *INS v. Stevic*,
 18 467 U.S. 407, 421 (1984) (Congress amended the INA to “basically conform[] it to
 19 the language of Article 33 of the United Nations Protocol”). When it acceded to the
 20 obligation, Congress made clear that “[n]othing in this section shall be construed to
 21 create any substantive or procedural right or benefit that is legally enforceable by
 22 any party against the United States or its agencies or officers or any other person.”
 23 8 U.S.C. § 1231(h). And when it allowed for judicial review of claims arising out of
 24 the withholding statute, Congress divested district courts of authority to hear such
 25

26 ¹¹ To the extent that Plaintiffs raise a *Mathews* balancing argument, *see* Pl. MSJ 33,
 27 that argument fails. As discussed, class members lack a protected interest. Even if
 28 they had a protected interest, the burdens to those interests are far outweighed by the
 burdens to the government’s and the public’s interests. *See infra* at Argument § VIII.

1 claims and channeled them instead into the courts of appeals to be reviewed along-
2 side a final order of removal. *Id.* §§ 1252(a)(5), (b)(9). In light of these statutory
3 restrictions, it would be an extraordinary exercise of lawmaking power by the Judi-
4 ciary that is nowhere suggested in the text or origins of the ATS, and that would be
5 manifestly contrary to the Supreme Court’s instruction to exercise “great caution”
6 in recognizing new causes of action under the ATS, *Sosa*, 542 U.S. at 727–28, for
7 this Court to recognize Plaintiffs’ novel cause of action. Plaintiffs seek to enforce
8 the same obligation that Congress adopted by statute, but to avoid the attendant lim-
9 itations on judicial review. Plaintiffs should not be permitted to circumvent those
10 statutory restrictions by couching their claims under the ATS.

11 *Second*, that Plaintiffs’ claims implicate national security and foreign relations
12 further demonstrates that the Court should not fashion a cause of action here. The
13 Supreme Court recently held that courts may not fashion a cause of action for dam-
14 ages under *Bivens* against U.S. officials based on claimed violations arising out of
15 cross-border shootings, reasoning that “the conduct of agents positioned at the bor-
16 der has a has a clear and strong connection to national security” and “regulating the
17 conduct of agents at the border unquestionably has national security implications.”
18 *Hernandez*, 140 S. Ct. at 746, 747; *see also City of Indianapolis v. Edmond*, 531
19 U.S. 32, 42 (2000). “[T]he risk of undermining border security provides reason to
20 hesitate before extending *Bivens* into this field.” *Hernandez*, 140 S. Ct. at 747. Fur-
21 ther, the claimed violations arose from a cross-border shooting (which “is by defini-
22 tion an international incident,” *id.* at 744) and “implicated” foreign relations, which
23 provided “even greater reason for hesitation” before creating a cause of action. *Id.*
24 at 747. The same national-security and foreign-relations implications are present
25 here. OFO’s function “to control the movement of people and goods across the bor-
26 der” indisputably “implicates an element of national security,” *id.* at 746, and its
27 cooperation with the Mexican government to regulate crossings of the shared border
28 is “by definition” an international affair, *id.* at 744. Thus, this Court should decline

1 to fashion a private cause of action for much the same reasons the Supreme Court
2 declined to fashion one in *Hernandez*.

3 Plaintiffs do not explain why this Court should recognize an ATS cause of
4 action, and instead merely argue that they *succeed* on an ATS claim. *See* Pl. MSJ
5 33–36. Those arguments are also flawed. *First*, the non-refoulement obligation that
6 Congress acceded to has never been “available to aliens at the border.” *Stevic*, 467
7 U.S. at 415. Even if this Court creates an ATS cause of action under the ATS, Plain-
8 tiffs offer no explanation why it should extend further than the INA. *Second*, a non-
9 refoulement obligation attaches under U.S. law when an individual’s life or freedom
10 would be threatened *on a protected ground*. 8 U.S.C. § 1231(b)(3)(A). Plaintiffs’
11 contention (at 34) that Defendants “‘knew or should have known’” that Mexican
12 “border towns are ... dangerous” is facially insufficient to establish this nexus. *Third*,
13 Plaintiffs cite only eighteen declarations¹² filed in support of their class-certification
14 motion (but not attached to their summary-judgment motion) showing the declarants
15 fear waiting in Mexico. Pl. MSJ 34. Even if credited, the declarations do not show
16 that all class or sub-class members “fear persecution or other harm” in Mexico, it
17 shows only that the eighteen declarants do. Accordingly, Plaintiffs fail to show that
18 relief would be “appropriate respecting the class as a whole.” Fed. R. Civ. P.
19 23(b)(2). *Finally*, Plaintiffs contend that Defendants have subjected class members
20 to “impermissible chain refoulement—that is, the risk that CBP’s expulsion of mi-
21 grants to Mexico will lead to Mexican-initiated deportation.” Pl. MSJ 35. But class
22 members have not been “exp[elled]” to Mexico, they are waiting in Mexico, a coun-
23 try through which many have voluntarily traveled. In any event, this theory would
24 require the Court to sit in judgment of Mexico’s enforcement of its own immigration

25
26 ¹² Defendants previously moved to strike some of these and other anonymous dec-
27 larations because Plaintiffs refused to share the declarants’ identities under the terms
28 of the protective order, which precluded Defendants from even evaluating whether
to seek discovery from the declarants. *See* ECF Nos. 411, 425. This Court should
decline to consider the declarations for the reasons discussed in the motions to strike.

laws within its own borders, which is precluded under the act-of-state doctrine. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (“the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory”); *see also Munaf v. Geren*, 553 U.S. 674, 700–01 (2008) (under the rule of non-inquiry, “it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments”). Plaintiffs’ ATS claim is not actionable, but even if it were it fails.

VIII. Plaintiffs are Not Entitled to the Relief They Seek.

Plaintiffs seek a permanent injunction requiring “Defendants to cease treating asylum seekers differently from all other people arriving at POEs on foot or by vehicle” and a declaratory judgment. Pl. MSJ 36–39. They are entitled to neither, and this Court should deny the request or allow briefing on the appropriate remedy, if necessary, after it rules on the merits.

First, Plaintiffs’ requested injunction is prohibited by 8 U.S.C. § 1252(f)(1) because it would “enjoin or restrain the operation of” § 1225(b)(1)(A)(ii) by rewriting it to apply to aliens outside the United States. *See Hamama v. Adducci*, 912 F.3d 869, 879–80 (6th Cir. 2018), *cert. denied* 2020 WL 3578681 (July 2, 2020) (§ 1252(f)(1) prohibits injunctions that “create[] out of thin air a requirement ... that does not exist in the statute”). Moreover, § 1252(f)(1) “restrict[s] courts’ power to impede” admission and removal statutes “on the basis of suits brought by organizational plaintiffs and noncitizens not yet facing [removal] proceedings.” *Padilla v. ICE*, 953 F.3d 1134, 1151 (9th Cir. 2020). Class members are by definition not yet facing removal proceedings, so they cannot obtain the requested injunction that rewrites § 1225’s clear terms.

Second, Plaintiffs are not entitled to an injunction under the traditional test. Injunctive relief is an “extraordinary remedy never awarded as of right.” *Winter v. NRDC*, 555 U.S. 7, 24 (2008). A party must demonstrate “(1) actual success on the merits; (2) that it has suffered an irreparable injury; (3) that remedies available at

law are inadequate; (4) that the balance of hardships justify a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction.” *Edmo v. Corizon, Inc.*, 935 F.3d 757, 784 (9th Cir. 2019). Because “it must be presumed that federal officers will adhere to the law as declared by the court,” the requirements for discretionary declaratory relief in this context should be the same. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (Scalia, J.). An injunction “should be no more burdensome to the defendant than necessary to provide complete relief.” *E. Bay*, 950 F.3d at 1282 (quotation marks omitted).

Plaintiffs’ claims fail on the merits, so they are not entitled to an injunction. But even if Plaintiffs showed actual success on the merits, the remaining prongs do not support the injunctive relief they request. The third prong weighs against a permanent injunction because vacatur, which is the customary and “appropriate remedy” for an APA violation, is an adequate legal remedy. *Cal. Wilderness Coalition v. DOE*, 631 F.3d 1072, 1095 (9th Cir. 2011); 5 U.S.C. § 706(2). If Plaintiffs were to succeed on their APA and duplicative due-process claims, the Court can vacate Defendants’ border-wide metering decisions rather than enter a permanent injunction and provide Plaintiff with complete relief on all claims, including their ATS claim, which is based on the same operative facts. And because the APA is the only statute that waives the United States’ sovereign immunity for an injunctive ATS claim, any ATS relief should be no broader than the relief granted under the APA.

The balance of hardships and the public interest, which should be considered together, *Sierra Club v. Trump*, 963 F.3d 874, 895 (9th Cir. 2020), also weigh against a permanent injunction. An order categorically enjoining metering at minimum “would require OFO to divert staffing and resources, both at the southern land border POEs and across the country, away from their priority missions and towards the processing of” undocumented aliens. Def. Ex. 1 ¶ 16. Although some class members may be adversely affected by metering, the order would impose direct economic harms on border communities, *id.* ¶¶ 16–17, result in significantly fewer inbound

1 drug interdictions from Mexico, *id.* ¶ 18, and would create humanitarian challenges
2 by crowding class members into facilities that “do not have showers, beds, laundry
3 facilities, or space for recreation” and “are not equipped to meet the needs of families
4 with small children” or “those with unique medical needs,” *id.* ¶ 19. It would also
5 significantly degrade the government’s national-security and law-enforcement mis-
6 sions. *Winter*, 555 U.S. at 31 n.5; Def. Ex. 9 at 1; Pl. Ex. 102 at 136:7–18 (over-
7 crowding “flat out degraded [CBP’s] ability to do other mission sets”), 184:7–21
8 (same); Def. Ex. 65; Def. Ex. 66 (showing diversions of resources); *supra* Facts
9 §§ B–D. There would also be a significant financial cost to the government. Def. Ex.
10 1 ¶ 23; Pl. Ex. 33 at 446. Mass parole, besides being contrary to the mandatory de-
11 tention scheme and the public’s “weighty interest in efficient administration of the
12 immigration laws at the border,” *E. Bay*, 932 F.3d at 779 (quotation marks omitted);
13 *supra* at Argument § V.A, would not alleviate these burdens. It would merely real-
14 locate them to “local NGOs, shelters, and other community organizations that often
15 provide assistance to aliens released from DHS custody.” Def. Ex. 1 ¶ 25. These
16 costs to the public, class members, and the government vastly outweigh the harms
17 to class members’ interests from metering.

18 Finally, Plaintiffs’ requested injunction is more burdensome than necessary to
19 provide complete relief. The “less drastic remedy” of vacatur would be “sufficient
20 to redress [Plaintiffs’] injury,” so “no recourse to the additional and extraordinary
21 relief of an injunction [is] warranted.” *Monsanto Co. v. Geertson Seed Farms*, 561
22 U.S. 139, 165–66 (2010). Even if the Court were to issue an injunction, it should
23 order the narrowest relief permissible and preserve metering as an option in certain
24 circumstances to give CBP the flexibility to adapt to changing circumstances and
25 mitigate harms to the United States.

26 CONCLUSION

27 The Court should deny Plaintiffs’ Motion for Summary Judgment and enter
28 summary judgment for Defendants.

1 DATED: September 25, 2020

Respectfully submitted,

2 JEFFREY BOSSERT CLARK
3 Acting Assistant Attorney General
4 Civil Division

5 WILLIAM C. PEACHEY
6 Director, Office of Immigration Litigation –
7 District Court Section

8 KATHERINE J. SHINNERS
9 Senior Litigation Counsel

10 /s/ Alexander J. Halaska
11 ALEXANDER J. HALASKA
12 Trial Attorney
13 United States Department of Justice
14 Civil Division
15 Office of Immigration Litigation
16 P.O. Box 868, Ben Franklin Station
17 Washington, D.C. 20044
18 Tel: (202) 307-8704 | Fax: (202) 305-7000
19 alexander.j.halaska@usdoj.gov

20 *Counsel for Defendants*

CERTIFICATE OF SERVICE

No. 17-cv-02366-BAS-KSC

I certify that I served a copy of this document on the Court and all parties by filing this document with the Clerk of the Court through the CM/ECF system, which will provide electronic notice and an electronic link to this document to all counsel of record.

DATED: September 25, 2020

Respectfully submitted,

/s/ Alexander J. Halaska

ALEXANDER J. HALASKA

Trial Attorney

United States Department of Justice

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
Civil Division
WILLIAM C. PEACHEY
Director, Office of Immigration Litigation –
District Court Section
KATHERINE J. SHINNERS (DC 978141)
Senior Litigation Counsel
ALEXANDER J. HALASKA (IL 6327002)
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 307-8704 | Fax: (202) 305-7000
alexander.j.halaska@usdoj.gov

Counsel for Defendants

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(San Diego)**

AL OTRO LADO, Inc., *et al.*,

Plaintiffs,

v.

Chad F. WOLF, Acting Secretary of
Homeland Security, in his official
capacity, *et al.*,

Defendants.

Case No. 3:17-cv-02366-BAS-KSC

DEFENDANTS' EXHIBIT 33




OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

October 10, 2017

MEMORANDUM FOR: The Honorable Claire M. Grady
Under Secretary for Management
Department of Homeland Security

FROM: John Roth 
Inspector General

SUBJECT: Investigation of Allegations Related to Temporary
Holding Facilities and Non-Intrusive Inspection
Equipment at U.S. Customs and Border
Protection (OSC File No. DI-17-0368)

The U.S. Office of Special Counsel (OSC) received a whistleblower disclosure alleging that Kevin McAleenan, Acting Commissioner, U.S. Customs and Border Protection (CBP), engaged in conduct that constitutes an abuse of authority and a gross waste of funds. Specifically, the whistleblower alleged that against the advice of senior CBP executives:

- McAleenan improperly allocated \$32,200,000 of CBP's Operations and Maintenance (O&M) funds to construct and operate temporary holding facilities in Tornillo, Texas and Donna, Texas from November 2016 to March 2017; and
- McAleenan halted Border Patrol agents' use of Non-Intrusive Inspection (NII) equipment from June 9, 2017 to June 19, 2017 in order to avoid scrutiny from the National Border Patrol Council prior to his confirmation hearing.

On July 14, 2017, OSC referred this complaint to then-DHS Secretary General John F. Kelly. The Department referred the matter for our consideration, and we agreed to investigate the allegations. Pursuant to 5 U.S.C. § 1213(c)(1)(B) and OSC procedures, a response from the Secretary (or her delegate) is due by November 13, 2017.

We have not substantiated these allegations. The decision to establish and operate the Tornillo and Donna facilities was based on sound



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evidence, after significant research, and with the consensus of CBP senior officials. Separately, while McAleenan did unilaterally decide to temporarily suspend the use of NII equipment by Border Patrol agents in the El Paso, Texas Sector for 10 days in June 2017, he did not receive objections from any senior officials, and we identified no evidence that his decision was based on anything other than a concern for the safety of CBP employees and their potential lack of confidence in the safety of the NII equipment. Consequently, we found no violations of law, rule, or regulation, or any gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. See 5 U.S.C. § 1213(a)(2).

In the course of this investigation, we interviewed approximately 15 witnesses and reviewed emails and other key documents. The whistleblower declined our request for an interview, but provided answers to our written questions.

Tornillo and Donna Temporary Holding Facilities

According to the whistleblower, McAleenan decided to build temporary facilities to hold undocumented immigrants at Tornillo, Texas and Donna, Texas. The whistleblower alleged that McAleenan made this decision unilaterally, without a proper basis, and against the advice and objections of CBP senior executives. The whistleblower stated the facilities were each built to hold approximately 450 individuals, but they never held more than a fraction of that capacity. The whistleblower claimed that CBP spent approximately \$32.2 million of O&M funds to build and operate these facilities, which left insufficient funds to purchase ammunition and other necessary equipment. Finally, the whistleblower claimed it was improper for CBP to use appropriated funds on holding facilities because U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO), and not CBP, is responsible for detaining aliens.

We found that the Tornillo and Donna facilities were built to address a documented surge of migrants arriving on the Southwest border in 2016. While the facilities were never filled to capacity, that was because the surge abruptly, drastically, and unexpectedly ended. The decision to build the facilities was collaborative, and we found no disagreement about that decision among CBP leadership. We also found that CBP kept DHS, Congress, and the White House informed about the need for and



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cost of the holding facilities, and we identified no appropriations, accounting, or procurement abnormalities related to the temporary facilities.

The decision to build the Tornillo and Donna facilities had a sound basis

In the summer and fall of 2016, CBP observed a large increase of foreign nationals arriving at the Southwest border. For example, in October and November 2016, the number of Border Patrol apprehensions and inadmissible aliens who arrived at Ports of Entry (POE) was 75% higher than the prior five-year averages for those months. Many witnesses told us this surge was related to the upcoming U.S. presidential election. Regardless of the election's outcome, there was a strong desire among migrants to arrive in the United States before the new president took office. According to the witnesses, the migrants believed they might receive amnesty if Hillary Clinton took office or that the border would close under Donald Trump's administration. Additionally, there were also substantial increases of Cubans and Haitians arriving at the U.S. border.

CBP lacked sufficient space to hold all the apprehended and inadmissible aliens. Generally, CBP only holds aliens for short periods of time while they are being processed and awaiting transfer to either the U.S. Department of Health and Human Services (HHS) (for unaccompanied alien children (UAC)) or to ICE ERO (for everyone else).¹ However, HHS and ICE ERO both struggled to keep up with the surge of individuals, which resulted in a backup at CBP facilities. In particular, the POEs became especially crowded. Several witnesses told us that aliens, including children, were forced to sleep in hallways, conference rooms, and breakrooms because there was nowhere else to put them. Witnesses told us that holding people in these conditions presented health and safety concerns for both the people being held and the CBP employees at these facilities. Moreover, CBP employees were taken away from their regular enforcement duties in order to help feed and care for the detainees. According to one witness, CBP facilities were "drowning in bodies."

¹ CBP's policy is to make every effort to hold individuals for the least amount of time possible and "generally not . . . longer than 72 hours." U.S. Customs and Border Protection, National Standards on Transport, Escort, Detention, and Search (Oct. 2015), § 4.1. Additionally, except in exceptional circumstances, UACs must be transferred to HHS within 72 hours of determining that the child is a UAC. 8 U.S.C. § 1232(b)(3).



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Seeking to learn lessons from and avoid repeating mistakes made during a prior surge of UAC in 2014,² CBP established a Crisis Action Team (CAT team) in October 2016 to manage its response to this migration surge. Composed of representatives from various CBP components, the CAT team compiled data and developed strategies to address the surge and overcrowding. The CAT team combined data and intelligence gathered by different CBP offices into a daily report, which it provided to CBP leadership. The CAT team also briefed the leadership daily on the data and what it was doing to address the surge.

The CAT team considered several approaches to address the overcrowding. For example, it tried working with Mexico to “meter” the number of individuals allowed to enter the U.S. at a given time, to ensure that CBP had space for everyone. It also tried getting ICE to increase the number of deportation flights. Additionally, ICE offered to transfer a building it was no longer using to CBP so that CBP could convert it into a holding facility. However, the building was far from where CBP had the most need and CBP did not want to assume permanent control of it.

The CAT team, in conjunction with CBP’s Office of Facilities & Asset Management (OFAM), also explored building temporary facilities to hold aliens until ICE ERO and HHS could accept them. In CBP’s view, temporary facilities offered several advantages. First, they could be built much more quickly and less expensively than permanent facilities. Within just a few weeks, CBP could solicit bids, sign a contract, and have a facility built and operational. Temporary facilities were also scalable, meaning capacity could be increased or decreased relatively easily to meet demand. Additionally, the facilities could be primarily staffed by contractors, which was attractive to CBP because it would allow CBP personnel to return to their regular enforcement duties rather than caretaking and custodial work.

In evaluating potential sites for temporary facilities, OFAM, the CAT team, and CBP leadership evaluated several factors, such as the

² See, e.g., Memoranda from John Roth, DHS Inspector General to the Honorable Jeh C. Johnson re: Oversight of Unaccompanied Alien Children (July 30, Aug. 28 & Oct. 2, 2014), https://www.oig.dhs.gov/sites/default/files/assets/Mga/2016/Over_Un_Ali_Chil.pdf; https://www.oig.dhs.gov/sites/default/files/assets/Mga/2016/Sig_Mem_Over_Unac_Alien_Child090214.pdf; https://www.oig.dhs.gov/sites/default/files/assets/Mga/2016/Over_Un_Ali_Child_100214.pdf.



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locations of migration flows, accessibility, and logistical needs. After considering several sites in Texas, Arizona, and California they ultimately selected Tornillo as the first location. They chose Tornillo because it was adjacent to a POE, it was on land already owned by the government, and it was only 45 miles from El Paso, which was one of the most overcrowded POEs. They later selected Donna as the second location because it was also near the migration flow, it had a lot of available land, and it met other logistical needs. Tornillo opened on November 25, 2016 and Donna opened on December 10, 2016. Both facilities became operational approximately two weeks after CBP selected the site. Both facilities were initially built to hold up to 500 people, and both could be expanded if necessary.

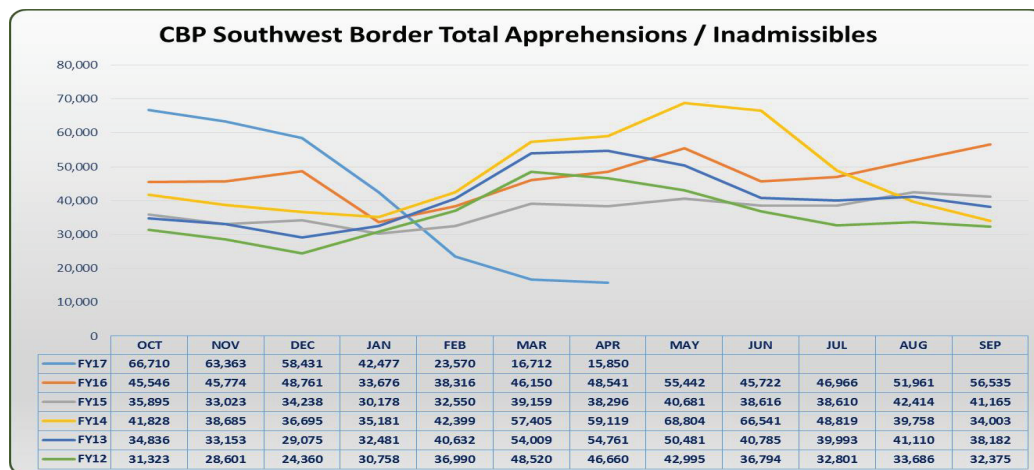
In December 2016 and January 2017, the number of aliens arriving at the border began to decline from the prior months but was still significantly higher than in prior years. Many witnesses told us this was a normal pattern. Every year, the numbers decline in these months because people stay in their native countries to celebrate the holidays. Then, the numbers begin to increase in the new year and into the spring. Therefore, even though fewer people arrived in December and January, the witnesses uniformly told us that they expected the numbers to rise again. However, this did not happen. After the presidential inauguration, the numbers dropped suddenly and drastically, to historic lows. The witnesses told us they were stunned at how low the numbers were.

Table 1, taken from the CAT team's May 2, 2017 briefing, shows the total number of Border Patrol apprehensions and inadmissible aliens who arrived at POEs on the Southwest border. As shown, from August 2016 through January 2017, this number was significantly higher than any of the prior five years, and it drastically declined beginning in February 2017. In prior years, the table shows the typical December – January decrease and February – May increase that many of the witnesses described to us.



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Table 1



As the numbers of apprehensions and inadmissible arrivals dropped, so too did the number of people being held at the Tornillo and Donna facilities. By February, there were only a few days in which the two facilities held more than 100 people combined (out of 1,000 total capacity). Therefore, in mid-February 2017, CBP decided to place the facilities in “stand-by” mode. This meant that the facilities remained intact with basic maintenance, but they did not hold any detainees. It cost approximately \$1.8 million to keep the two facilities in stand-by mode each month, which was approximately \$2.8 million less than keeping them fully operational. The facilities could be reactivated from stand-by status within 72 hours, at a minimal cost. In contrast, if the facilities were permanently closed, it would cost approximate \$6.6 million to reopen them if necessary. Therefore, in CBP’s view, keeping the facilities in stand-by mode was a form of insurance, in case the migration flow increased again. By mid-April 2017, the numbers had not increased and so McAleenan gave the order to permanently close the facilities.

The Tornillo facility held a total of 5,721 aliens over 82 days (November 25, 2016 – February 14, 2017). It held an average of 174.34 aliens per day. The Donna facility held 2,172 aliens over 63 days (December 10, 2016 – February 10, 2017). It held an average of 43.52 aliens per day.³ The total cost for the two facilities was approximately \$20 million.

³ The daily average is higher than the number of aliens divided by the number of days the facility was open because aliens often remained at a facility for more than one day.



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The decision to build and maintain the facilities was a collaborative agency decision

We found that McAleenan did not unilaterally make the decision to build the Tornillo and Donna facilities, as the whistleblower alleged. Many CBP senior executives, as well as the CAT team, were closely involved in the process of addressing the surge and the specific decisions to open and locate temporary holding facilities. The CAT team met with CBP senior executives daily during this time, and one senior member of the CAT team told us that McAleenan did not dictate any particular course of action. Instead, according to the witnesses we interviewed, there was always a discussion based on the information provided by the CAT team. Indeed, McAleenan was not even CBP's Commissioner when the facilities were built in 2016. Then-Commissioner Gil Kerlikowske ultimately made the decision to open the facilities.

Moreover, CBP was in constant communication about the migration surge with the White House, then-DHS Secretary Jeh C. Johnson, then-acting DHS Deputy Secretary Russ Deyo, and others throughout DHS and its components. One senior member of the CAT team recounted attending regular meetings at DHS headquarters where then-Secretary Johnson was briefed on the crisis and approved a number of proposed solutions, including the temporary facilities. We also identified emails confirming the Secretary's awareness and involvement.

Every current and former CBP senior executive whom we interviewed (which includes every person the whistleblower identified as objecting to the facilities) told us they agreed with the decision to establish the temporary facilities. Most witnesses also told us that all CBP senior executives agreed with the decision to open the Tornillo and Donna facilities, though one witness recalled another senior official who agreed with the need for the temporary facilities, but argued that it was ICE's responsibility to establish them. While we reviewed documents that identified potential benefits and risks of various measures for addressing the migration surge, including the temporary facilities, we found no emails or documents showing major objections to the proposed plan. Nor

The daily averages above reflect the total number of aliens that were at each facility each day, regardless of how long each alien spent at the facility. We identified other CBP reports that showed different figures because the data was collected using different methodologies (e.g. measuring the number of aliens at the facilities at one particular time each morning).



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did we identify any documents that contradicted the witnesses' assertions that CBP leadership was generally all in agreement with the decision to open the Tornillo and Donna facilities.

However, there was some disagreement as to when to close the facilities. In March 2017, several CBP executives recommended permanently closing the facilities (which at that time were in stand-by status) because they believed the migration levels would remain low due to policy changes and other factors. However, McAleenan decided to keep the facilities in stand-by status for one additional month. He told us there were several reasons for his decision. First, he worried that policy changes at ICE might lead to another backup. Second, he was mindful that a recent Executive Order and DHS guidance for implementing that order instructed CBP to ensure sufficient short-term detention capacity.⁴ Third, he was concerned that the migrants' initial reluctance to come to the U.S. after the inauguration might wear off. Finally, he feared the annual Spring migration increase. We identified a contemporaneous email demonstrating McAleenan's concern related to ICE, but no documentation of the other concerns he shared with us. Nonetheless, his explanation was credible and we found no evidence to the contrary.

In any event, no senior official we spoke to, including the ones who recommended closing the facilities in March, criticized McAleenan's decision to keep the facilities in stand-by status for another month. To the contrary, the officials said they understood McAleenan's decision, that it was a judgment call, and that it was not an objectively incorrect decision. The following month, McAleenan accepted the recommendation and decommissioned the facilities.

⁴ On January 25, 2017, President Trump signed Executive Order 13,767, which directed the DHS Secretary to "take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico" and "immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law" Exec. Order No. 13,767, §§ 5(a), 6. On February 20, 2017, then-DHS Secretary General Kelly issued a memorandum implementing the Executive Order that instructed the ICE Director and CBP Commissioner to "take all necessary action and allocate all available resources to expand their detention capabilities and capacities at or near the border with Mexico to the greatest extent practicable" and for CBP to focus on expanding "short-term detention" capability. Memorandum from John Kelly, DHS Secretary to Kevin McAleenan, Acting Commissioner, CBP, *et al.*, Implementing the President's Border Security and Immigration Enforcement Improvements Policies, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.



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We identified no appropriations, accounting, or procurement abnormalities associated with the Tornillo and Donna facilities

The whistleblower claimed it was unlawful for CBP to use appropriated funds on “detention” facilities because only ICE may detain aliens. Similarly, some witnesses told us that others within CBP believed ICE should be responsible for building temporary facilities because ICE was the cause of the backlog. As an initial matter, there was nothing fundamentally improper about CBP establishing temporary facilities to hold aliens. The Tornillo and Donna facilities merely did what CBP is statutorily required to do (and has continued to do since the facilities closed) – holding aliens in short-term detention until they can be processed and transferred to HHS or ICE ERO. During the surge, CBP simply ran out of space to hold the aliens in its existing facilities, and the temporary facilities were built to expand its capacity.

Moreover, CBP was transparent about the Tornillo and Donna facilities with DHS, Congress, and the White House. Indeed, CBP argued to then-DHS Secretary Johnson that ICE should build the facilities, but he decided that CBP would be responsible for standing up the facilities. During the migration surge, CBP regularly briefed and communicated with Congress about the surge and its costs, and provided specific information about the Tornillo and Donna facilities. For example, in November 2016, CBP representatives, along with representatives from DHS, ICE, and U.S. Citizenship and Immigration Services, provided a briefing on the surge to staff from the Homeland Security Subcommittees of Congress’ Appropriations Committees. During that briefing, CBP summarized the surge’s impact on its budget and identified its surge-related expenses, including the actual and projected costs of the Tornillo and Donna facilities. In January 2017, CBP again briefed staff from those subcommittees on its surge response and provided updated cost information on the Tornillo and Donna facilities. Finally, McAleenan told us, and we found emails confirming, that White House officials were closely involved in managing the surge and were well aware of the Tornillo and Donna facilities.

Nor did we find any other appropriations issues related to the Tornillo and Donna facilities. CBP was operating under two continuing resolutions (CR) during much of the time it was addressing the surge.



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During the first CR,⁵ CBP was able to address its surge-related expenses, including the Tornillo and Donna facilities, with the funds it had been apportioned by the Office of Management and Budget (OMB). However, CBP projected that its surge-related expenses would continue to increase after the CR expired, and therefore asked Congress for the authority in the next CR “to obligate funding under the CR formula at a rate for operations necessary to respond to ongoing unpredictable surges in migration.”⁶ Congress granted CBP this flexibility through an anomaly in the second CR for Fiscal Year 2017.⁷ A CBP official familiar with the anomaly process told us that CBP followed typical procedures for seeking and receiving this anomaly. After Congress included this anomaly in the second CR, DHS requested an exception apportionment from OMB on CBP’s behalf.⁸ The materials accompanying this request specifically referenced the Tornillo and Donna facilities. OMB approved the exception apportionment request in February 2017.

We also found that CBP used the correct source of funds for the temporary facilities and the other surge expenses. CBP used funds from the Operations and Support (O&S) appropriations category, which is the category used to support the costs associated with DHS operations and maintenance activities.⁹ This funding category was new for Fiscal Year 2017 so there was no precedent for using it. However, Congress validated this approach by twice later using the O&S category for surge expenses: in the anomaly in the second CR and in its enacted Fiscal Year 2017 appropriation for CBP.

⁵ The first CR was in place October 1, 2016 – December 9, 2016. Continuing Appropriations Act, 2017, Pub. L. No. 114-223, div. C, § 106, 130 Stat. 908, 909–10 (2016).

⁶ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FY 2017 CONTINUING RESOLUTION (CR) APPROPRIATIONS ISSUES (ANOMALIES REQUIRED FOR A CR THROUGH MARCH) 8.

⁷ Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254, div. A, § 101, 130 Stat. 1005, 1008 (2016) (amending first CR to add section 163). The second CR for Fiscal Year 2017 was in place December 10, 2016 – April 28, 2017.

⁸ An exception apportionment “is a colloquial term that describes the written apportionment that is issued for operations under a [CR], in lieu of the OMB-issued automatic apportionment.” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 120.5 (2016).

⁹ DHS, Financial Management Policy Manual ch. 2, § 2.0.15 (Oct. 1, 2016).



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While we did not formally audit the procurement of the Tornillo and Donna facilities, we found nothing in either our review of documents or interviews of relevant personnel which would indicate any abnormality in the procurement process. Witnesses told us that CBP relied mainly on its procurement staff to handle the procurement process for the facilities, and that McAleenan and other senior executives did not interfere with or influence the process. Nor is there evidence that McAleenan benefitted in any way from the facilities contracts. He was not involved in the procurement process, his financial disclosure forms reveal no financial ties to the contractor that was selected, and no witnesses were aware of McAleenan receiving any benefit from the contracts. Indeed, McAleenan seemed to genuinely not recognize the name of the contractor during our interview of him.

Lastly, we did not substantiate the whistleblower's claim that the Tornillo and Donna facilities left CBP unable to purchase ammunition and other necessary equipment. We asked the whistleblower for more information about this allegation, but he/she could not identify any specific needs that were not met because CBP funded the facilities. In fact, in the Fiscal Year 2017 omnibus appropriation, Congress included sufficient "surge operations" funding to CBP to cover all of its surge-related costs. Therefore, CBP was eventually made whole for all of the costs associated with the Tornillo and Donna facilities. Before the omnibus appropriation, DHS acknowledged to Congress that CBP had temporarily diverted funds from other needs to pay for the facilities, but witnesses told us that no mission critical requirements or equipment were unfunded.

In our view, CBP's decision to stand up the two detention facilities in the manner it did was reasonable and did not constitute an abuse of authority or a gross waste of funds.

Shutdown of Non-Intrusive Inspection (NII) Equipment

The whistleblower separately alleged that in response to a National Border Patrol Council (NBPC) advisory, McAleenan ordered Border Patrol agents on the Southwest Border to stop using NII equipment from June 9, 2017 to June 19, 2017. According to the whistleblower, McAleenan ordered this shutdown even though senior Border Patrol officials informed him that CBP had previously shut down the NII equipment, examined it, and determined it to be safe. Further, the whistleblower



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suggested that McAleenan did not conduct a substantive review of the NII equipment during the June shutdown, and allowed Office of Field Operations (OFO) officers at POEs, who are not NBPC members, to continue using NII equipment. The whistleblower claimed McAleenan ordered the shutdown in order to avoid NBPC scrutiny before his confirmation hearing.

We found no evidence that McAleenan ordered the shutdown for any reasons other than his concerns for the health and safety of CBP employees and their confidence in the NII equipment. At the time he ordered the shutdown, McAleenan was unaware that the NII equipment in question was previously examined in March 2017. While he learned that shortly after ordering the shutdown, he did not cancel the shutdown because he believed the complaint was specific and credible and he did not know the details of the prior examination. Moreover, the NBPC advisory was specific to Border Patrol agents in the El Paso region and so, in McAleenan's view, there was no reason to stop using NII equipment in other regions or at POEs. During the June shutdown, CBP leadership reviewed the results of the prior examination, consulted with subject matter experts, and determined that no further testing was necessary to confirm the safety of the equipment.

McAleenan was not aware of the prior examination when he ordered the shutdown

On June 9, 2017, the Deputy Chief of the Border Patrol briefed CBP leadership about a NBPC advisory she had just received. The advisory stated that there were "at least 8 confirmed cases of cancer (7 Papillary Thyroid Carcinoma, 1 Medullary Thyroid Carcinoma) among" Border Patrol agents who used NII equipment in the El Paso Sector. McAleenan was not at the briefing because he was on official travel in Mexico City. Following the briefing, the Acting CBP Chief of Staff forwarded the NBPC advisory to McAleenan, and 17 minutes later, McAleenan responded with an instruction to stand down the equipment.

We confirmed McAleenan's assertion that when he received the NBPC advisory on June 9, 2017, he was not aware that the NII equipment in El Paso previously had been shut down and examined in March 2017. The March shutdown was ordered by the El Paso Sector Chief, not by officials at CBP headquarters in Washington. Most of the headquarters officials we spoke to said they were not aware of the March shutdown when they received the NBPC advisory in June, and they did not think McAleenan



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was aware of it either. We reviewed McAleenan's emails between March and June 2017, and found no mention of the March shutdown or any other NII equipment safety concerns until he received the NBPC advisory on June 9, 2017.

Later on June 9, 2017, after McAleenan had already ordered the shutdown, he received a brief timeline about the March shutdown. However, because he was in Mexico City and attending meetings all day, he was not able to speak to anybody extensively about the March shutdown or fully evaluate the thoroughness of that inspection. Therefore, he did not reverse his decision.

McAleenan offered credible reasons for ordering the June shutdown and received no objections about that decision

McAleenan told us he was most concerned that eight people within the El Paso Sector had been diagnosed with cancer. He believed that eight agents with similar cancers within one region were too many to be a coincidence. Further, he thought the specificity of the diagnoses in the advisory gave it credibility. McAleenan said he decided to shut down the equipment only in the El Paso Sector, and only within the Border Patrol, because the eight diagnoses there suggested that the problem was localized. Moreover, shutting down OFO's use of NII equipment at the POEs would be much more debilitating than shutting down the Border Patrol's use of it. NII equipment is one of many tools that the Border Patrol uses, and a temporary shutdown would not substantially harm the Border Patrol's operations. In contrast, NII is an integral tool for OFO, and a shutdown at the POEs would have a major impact.

McAleenan's explanation is internally consistent and was corroborated by other witnesses. The existence of eight cancer cases within a relatively small population suggests specific faulty equipment rather than a widespread problem with NII equipment. Therefore, it was not unreasonable, in our view, to stop using and examine the particular equipment in El Paso rather than shutting down all equipment throughout the country. Additionally, many witnesses confirmed that NII equipment is much more important to OFO than the Border Patrol. For example, a senior OFO official told us that NII equipment "is a cornerstone" of their operations at POEs, while a senior Border Patrol official told us that NII equipment is not a primary tool. In fact, the Border Patrol generally does not employ replacement equipment when a NII machine breaks or is taken offline for repairs. Instead, while NII



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equipment is out of service, the Border Patrol increases its use of other inspection tools.

The whistleblower claimed that several senior CBP officials communicated objections about the shutdown to McAleenan. While some witnesses told us they disagreed with McAleenan's decision and might have made a different decision, they understood his decision and did not express their objections to McAleenan. Nor did we find any emails suggesting that any objections were communicated to McAleenan about this decision. Before it was clear that McAleenan was only shutting down the Border Patrol's use of NII equipment, the head of OFO objected to shutting down the use of NII equipment at the POEs. But he did not express objections once he learned that the shutdown only affected the Border Patrol.

The Border Patrol developed and presented sound evidence for restarting the use of NII equipment to McAleenan

During the June shutdown, the Border Patrol re-evaluated the testing done in March, spoke with experts from CBP's Occupational Safety and Health Division who oversaw the March testing, reviewed recent radiation measurements, met with other stakeholders, and prepared detailed timelines and issue papers on the NII equipment. Based on this work, the Border Patrol determined that the NII equipment in the El Paso Sector was safe, and that no new testing was necessary. Consequently, after they presented their findings to McAleenan on June 19, 2017, he ordered the end of the shutdown.

Importantly, during the shutdown CBP attempted to confirm the eight cancer diagnoses alleged by the NBPC, but only identified two people who claimed their cancer diagnoses were related to their use of NII equipment. Given the importance McAleenan had placed on the number of alleged diagnoses, discovering that number was incorrect gave McAleenan comfort that the NII equipment was safe.

We found no evidence that McAleenan shut down the use of NII equipment to appease the union

McAleenan told us that he ordered the shutdown for two primary reasons – the safety of CBP employees and their confidence in using the NII equipment. First, he said safety of CBP employees “is paramount” and “an unacceptable risk.” Secondarily, he said the morale and engagement



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of CBP employees was important and he wanted to be sure that they were comfortable using the equipment. We found nothing that contradicted this. Other witnesses told us that McAleenan was concerned only with the safety and welfare of CBP employees. Not one witness thought his confirmation process or his relationship with the union factored into McAleenan's decision at all. Nor did we find anything in McAleenan's emails that suggested anything untoward in regard to the union. There were limited references to the union before and during the shutdown, and those references reflected a balance of tension and cooperation that would be expected between an agency and a union.

Based on our review of the evidence, we do not believe McAleenan's decision to temporarily shut down the use of NII equipment in El Paso constituted an abuse of authority. We believe it was a reasonable decision based on the information he had at the time, and that he ordered the shutdown out of concern for CBP employees rather than his own self-interest.

MAYER BROWN LLP
Matthew H. Marmolejo (CA Bar No. 242964)
mmarmolejo@mayerbrown.com
350 S. Grand Avenue
25th Floor
Los Angeles, CA 90071-1503
Ori Lev (DC Bar No. 452565)
(*pro hac vice*)
olev@mayerbrown.com
Stephen M. Medlock (VA Bar No. 78819)
(*pro hac vice*)
smedlock@mayerbrown.com
1999 K Street, N.W.
Washington, D.C. 20006
Telephone: +1.202.263.3000
Facsimile: +1.202.263.3300

SOUTHERN POVERTY LAW CENTER
Melissa Crow (DC Bar No. 453487)
(*pro hac vice*)
melissa.crow@splcenter.org
1101 17th Street, N.W., Suite 705
Washington, D.C. 20036
Telephone: +1.202.355.4471
Facsimile: +1.404.221.5857

Additional counsel listed on next page
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Al Otro Lado, Inc., *et al.*,

Plaintiffs,

v.

Chad F. Wolf,¹ *et al.*,

Defendants.

Case No.: 17-cv-02366-BAS-KSC

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT**

REDACTED PUBLIC VERSION

Special Briefing Schedule Ordered (*See*
Dkt. 518)

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

¹ Acting Secretary Wolf is automatically substituted for former Acting Secretary McAleenan pursuant to Fed. R. Civ. P. 25(d).

1 CENTER FOR CONSTITUTIONAL RIGHTS

2 Baher Azmy (NY Bar No. 2860740) (*pro hac vice*)

3 *bazmy@ccrjustice.org*

4 Ghita Schwarz (NY Bar No. 3030087) (*pro hac vice*)

5 *gschwarz@ccrjustice.org*

6 Angelo Guisado (NY Bar No. 5182688) (*pro hac vice*)

7 *aguisado@ccrjustice.org*

8 666 Broadway, 7th Floor

9 New York, NY 10012

10 Telephone: +1.212.614.6464

11 Facsimile: +1.212.614.6499

12 SOUTHERN POVERTY LAW CENTER

13 Sarah Rich (GA Bar No. 281985) (*pro hac vice*)

14 *sarah.rich@splcenter.org*

15 Rebecca Cassler (MN Bar No. 0398309) (*pro hac vice*)

16 *rebecca.cassler@splcenter.org*

17 150 E. Ponce de Leon Ave., Suite 340

18 Decatur, GA 30030

19 Telephone: +1.404.521.6700

20 Facsimile: +1.404.221.5857

21 AMERICAN IMMIGRATION COUNCIL

22 Karolina Walters (DC Bar No. 1049113) (*pro hac vice*)

23 *kwalters@immcouncil.org*

24 1331 G St. NW, Suite 200

25 Washington, D.C. 20005

26 Telephone: +1.202.507.7523

27 Facsimile: +1.202.742.5619

28

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1 **I. INTRODUCTION**

2 Every day at ports of entry (“POEs”) on the U.S.-Mexico border, U.S.
3 Customs and Border Protection (“CBP”) officers inspect thousands of people in
4 vehicles in the order that those vehicles arrive at POEs. Until 2016, CBP officers
5 also inspected thousands of pedestrians who traveled to POEs in the order that those
6 pedestrians arrived at POEs. In May 2016, everything changed. Starting at the San
7 Ysidro POE, CBP officers began turning asylum seekers—and only asylum
8 seekers—back to Mexico, telling them that if they wanted to be inspected and
9 processed—actions required by statute—they needed to return to the POE “later.”
10 Later that year, Defendants decided to expand this turnback policy to other POEs
11 along the southern border, instead of doing what they have always done—finding
12 solutions that enable them to inspect and process asylum seekers as they arrive at
13 POEs.

14 Initially, Defendants did not put the turnback policy in writing, keeping it in
15 a self-admitted gray area that CBP used to justify turning back asylum seekers by
16 various means. Then, in the spring of 2018, CBP and the U.S. Department of
17 Homeland Security (“DHS”) issued memos memorializing aspects of the turnback
18 policy—referred to as “metering” or “queue management.” As Defendants drafted
19 these memos, they explicitly contemplated turning back hundreds of asylum seekers
20 at POEs each day pursuant to the memos, and disregarded obvious signs that a
21 humanitarian disaster in Mexico would result. Then, they denied POEs permission
22 to inspect and process asylum seekers more quickly.

23 The turnback policy is based on a lie. CBP told asylum seekers that POEs
24 were “at capacity” when the POEs were actually well below capacity. Even in the
25 rare cases where the capacity of a POE was close to 100% utilized, inspecting and
26 processing asylum seekers had minimal or no impact on other POE operations. As a
27 result, the “capacity excuse was a lie” that “was obvious to everybody” that
28

1 implemented it at POEs. Ex. 1 at 100:25-101:6.² Moreover, Defendants “lack[ed]
 2 candor to the public [by not] stating the true facts that [CBP is] . . . blocking asylum
 3 to persons and families in order to block the flow of asylum applicants.” Ex. 2 at
 4 132. Meanwhile, behind the scenes, CBP officials admitted that the turnback policy
 5 broke the law. Ex. 2 (“[CBP] [r]epresentatives acknowledged that [CBP’s] unilateral
 6 work policies broke . . . Federal immigration rules and Laws”); Ex. 3 at 125:2-15.

7 The turnback policy violates the Immigration and Nationality Act (“INA”),
 8 the Administrative Procedure Act (“APA”), the Due Process Clause of the Fifth
 9 Amendment, and the Alien Tort Statute (“ATS”) for several reasons. **First**, as this
 10 Court has already recognized, turnbacks amount to unlawful withholding of a
 11 discrete mandatory duty to inspect and process asylum seekers in violation of APA
 12 § 706(1). **Second**, turnbacks are at odds with the statutory scheme governing POEs
 13 in violation of APA § 706(2). **Third**, overwhelming and undisputed evidence shows
 14 that Defendants’ stated justification for the turnback policy is a pretext, their real
 15 motivations are unlawful, and the policy is otherwise arbitrary and capricious in
 16 violation of the APA. **Fourth**, since the turnback policy violates the statutory
 17 procedure for inspecting and processing asylum seekers and otherwise represents an
 18 arbitrary deprivation of a statutory entitlement, the policy violates the Due Process
 19 Clause. **Fifth**, the turnback policy violates the ATS because it violates the specific,
 20 universal, and obligatory norm of *non-refoulement*.

21 Defendants claim that they turned back asylum seekers to maintain the
 22 “operational capacities” of POEs. *See* Dkt. 283 at ¶ 7. This argument fails for two
 23 reasons. **First**, turnbacks are unlawful regardless of Defendants’ justification for
 24 them. **Second**, even if Defendants’ justification were theoretically relevant, it is
 25 undisputed that Defendants never defined the term “operational capacity,” do not
 26 track “operational capacity,” cannot calculate the “operational capacity” of any POE,

27 _____
 28 ² “Ex.” refers to the exhibits to the concurrently filed Declaration of Stephen M. Medlock.

1 and cannot link the decision to turn back asylum seekers to particular changes in
2 “operational capacity.” Since Defendants cannot define, track or calculate
3 “operational capacity”—or link it to the decision to turn back asylum seekers—it is
4 not, in fact, a justification for their conduct.

5 Because Plaintiffs succeed on the merits, a permanent injunction is warranted.
6 **First**, Plaintiffs have suffered irreparable injuries. Class members have been killed,
7 raped, and seriously injured after Defendants turned them back to Mexico. In
8 addition, class members’ loss of the right to seek asylum constitutes a loss of
9 statutory and constitutional rights that courts recognize as irreparable harm.
10 Similarly, Al Otro Lado suffered irreparable harm when it was forced to radically
11 change its operations in order to account for the turnback policy. **Second**, there is no
12 adequate remedy at law. Neither a declaratory judgment nor monetary damages
13 could adequately ensure access to the asylum process or prevent the harm that results
14 from class members being turned back at the U.S. border and left stranded in
15 dangerous border towns in Mexico. **Third**, the balance of hardships tips decisively
16 in Plaintiffs’ favor. Plaintiffs only ask that asylum seekers be treated the same as
17 others who approach POEs, consistent with Defendants’ longstanding practices. Any
18 asserted administrative burden on Defendants cannot outweigh the risk of
19 persecution, serious injury, and death that class members face when turned back.
20 **Fourth**, there is a strong public interest in Executive Branch agencies following the
21 plain language of the INA and complying with international law. There is no public
22 interest in violating the law. Because there is no genuine factual dispute concerning
23 the permanent injunction factors, Plaintiffs request that the Court enter a permanent
24 injunction prohibiting all forms of turnbacks and requiring Defendants to inspect
25 asylum seekers as they arrive at Class A POEs on the U.S.-Mexico border.

26 Furthermore, since the undisputed facts show that Defendants broke the law,
27 this Court should enter a declaratory judgment that the turnback policy violates the
28 INA, the APA, class members’ procedural due process rights under the Fifth

Amendment, and the ATS. *See McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342 (9th Cir. 1966) (declaratory relief is appropriate regardless of “whether . . . further relief is . . . sought”).

II. THE UNDISPUTED FACTS

A. Overview of Defendants’ Unlawful Conduct

There is no cap on the number of asylum seekers who may arrive in the U.S. in a particular time period. Dkt. 260 at 4:24-5:2 (“there aren’t limits on the number of people who can seek asylum.”). When a person without entry documents is arriving at a POE and asserts a fear of return to her home country or an intention to seek asylum, CBP must inspect her, *see* 8 U.S.C. § 1225(a)(3), and process her—either refer the asylum seeker for an interview with an asylum officer, *see* 8 U.S.C. § 1225(b)(1), or place the asylum seeker into removal proceedings, which allows her to pursue asylum in immigration court, *see* 8 U.S.C. §§ 1225(b)(2), 1229a. CBP’s statutory duty to inspect and process arriving asylum seekers is “not discretionary.” *Munyua v. United States*, 2005 WL 43960, at *6 (N.D. Cal. 2005).

In 2016, Defendants departed from this congressionally-mandated process and implemented a policy to turn back asylum seekers who were in the process of arriving at POEs on the U.S.-Mexico border. *See* Ex. 1 at 46:12-21; Ex. 3 at 55:8-15. The policy was first implemented at the San Ysidro POE, the largest POE on the U.S.-Mexico border. By the end of 2016, it had spread to other major POEs. Shortly thereafter, it was implemented at every Class A POE on the U.S.-Mexico border.³

Initially, CBP management decided [REDACTED]—a practice that CBP uses when [REDACTED] Ex. 5 at 366 (CBP kept turnbacks “[REDACTED]”); Ex. 6 (head of CBP’s Office of Field Operations (“OFO”) stating that he was “[REDACTED]” but “[REDACTED]”).

³ A Class A POE is open to all travelers, including asylum seekers. Ex. 4 at 75:18-76:8.

1 [REDACTED]). This [REDACTED] meant that,
 2 initially, CBP turned back asylum seekers from POEs using a variety of tactics. CBP
 3 officers lied to some, Ex. 1 at 99:25-101:6; Ex. 3 at 145:3-7; coerced some to
 4 withdraw their applications for admission, Ex. 7 at 611 (permitting the use of
 5 “[REDACTED]
 6 [REDACTED]”); and used physical force to turn back others, Ex. 8 at
 7 045-046. Although the methods varied, the common result was clear: turning back
 8 asylum seekers to Mexico without processing them for asylum.⁴

9 Over time, Defendants formalized these practices into what is known as
 10 “metering” or “queue management.”⁵ When a POE is metering, “a non-citizen
 11 without proper travel documents [who] arrives at the border, . . . will be told that the
 12 port is at capacity and they should return to be processed later.” Ex. 4 at 171:7-13.
 13 Despite the formal documentation, CBP has no plan in place for asylum seekers to
 14 “return to be processed later.” *Id.* While metering, CBP often stations officers near
 15 the physical border line between the U.S. and Mexico and attempts to physically
 16 block those being metered from setting foot on U.S. soil. *Id.*⁶ Initially, class members
 17

18 ⁴ CBP’s treatment of certain class representatives is illustrative of the disparate
 19 means CBP employed initially to turn back asylum seekers. *See, e.g.*, Dkt. 390-11 at
 20 ¶¶ 15-19 (Plaintiff Abigail Doe was forced to sign a document withdrawing her
 21 asylum claim and returned from the U.S. to Mexico); Dkt. 390-12 at ¶¶ 9-21
 22 (Beatrice Doe was told she “had no right” to be in the U.S., was forced to withdraw
 23 her application for admission, and was returned from the U.S. to Mexico); Dkt. 390-
 24 13 at ¶¶ 18-26 (Carolina Doe was told she “would not receive asylum” and that she
 25 would be separated from her daughter and was then forced to withdraw her asylum
 26 claim before she was returned from the U.S. to Mexico); Dkt. 390-14 at ¶¶ 8-19
 27 (Dinora Doe was told “Central Americans did not understand that there was no
 28 asylum for us” and was told that she would be separated from her daughter if she
 attempted to seek asylum in the U.S.); Dkt. 390-15 at ¶¶ 13, 17-18 (Ingrid Doe was
 told that “asylum had ended” and that “there was a new law in the United States that
 meant no asylum” before she was turned back from the U.S. to Mexico).

⁵ “Metering” and “queue management” are synonyms. Ex. 4 at 176:18-22; Ex. 9 at
 102:21-103:2; Ex. 10 at 43:2-4.

⁶ *See, e.g.*, Dkt. 390-103 at ¶¶ 5-8 (Plaintiff Juan Doe was turned back after
 requesting protection at the middle of a bridge leading to a POE by two American
 officials who said that he “could not pass,” “the port was closed,” and that he had to
 “wait [his] turn”); Dkt. 390-104 at ¶¶ 5-6 (same for Ursula Doe).

1 remained in a line at the border, for days or even weeks, waiting to be processed.
 2 *See, e.g.*, Ex. 10 at 152:16-153:8 (initially [REDACTED]); Ex. 11 at 298
 3 (“[REDACTED]”). This resulted in a growing
 4 humanitarian crisis in Mexico. *See, e.g.*, Ex. 12 at 742 (UNHCR reporting [REDACTED]
 5 [REDACTED]). CBP
 6 officers met with their Mexican counterparts to make arrangements to limit the flow
 7 of asylum seekers to the U.S. border. *See* Ex. 13 at 607 (“[REDACTED]
 8 [REDACTED]
 9 [REDACTED]”); Ex. 14 at 123:21-124:20. Subsequently, a
 10 new system arose in which asylum seekers placed their names on waitlists in Mexico
 11 in order to be inspected at a POE, and when a particular POE decided to inspect
 12 more asylum seekers, CBP would direct its Mexican counterparts to bring a certain
 13 number of asylum seekers to the POE for processing.⁷ *See, e.g.*, Ex. 15 at 966 (“[REDACTED]
 14 [REDACTED]
 15 [REDACTED]”); Ex. 16 at 140:1-16 (“If [Mexican immigration] brings
 16 them over, we’re going to take them in, if we’ve called [Mexican immigration] to
 17 bring over some.”).

18 Importantly, CBP concedes that asylum seekers approaching the U.S.-Mexico
 19 border are “attempting to enter the United States at a [POE]” when they are turned
 20 back. Ex. 17 at 201:22-202:3. CBP also admits that it has turned back asylum seekers
 21 who were standing on U.S. soil. *See* Ex. 4 at 171:14-172:10; Ex. 3 at 101:21-102:10;
 22 Ex. 1 at 96:11-97:18; Ex. 10 at 93:1-94:18; Ex. 18 (recording of turnback where an
 23 asylum seeker was told to “go back to Mexico.”); Ex. 19 at 2.

24 Defendants’ justification for the turnback policy—a purported lack of
 25

26 ⁷ *See, e.g.*, Dkt. 390-100 at ¶¶ 8-9, 14 (Plaintiff Bianca Doe put herself on a waitlist
 27 maintained by Mexican authorities who were restricting people from approaching
 28 the POE and was turned back by CBP officers who told her that the POE was “full”);
 Dkt 390-105 at ¶¶ 8-12 (a CBP officer told Plaintiff Emiliana Doe that “everywhere
 was full and they could not accept any more people” and she put her name on a
 waitlist).

1 “operational capacity”—is a pretext. CBP kept daily records of POE capacities,
 2 which show that POEs generally operated well below 100% capacity. Moreover,
 3 POEs almost never reported that the number of asylum seekers at the POEs had [REDACTED]
 4 [REDACTED]. See Ex. 20 at ¶¶ 22, 101-23; Ex. 21; Ex. 22; Ex. 23; Ex.
 5 24; Ex. 25. In the few instances of high numbers of asylum seekers arriving at POEs,
 6 Defendants could have operated in line with their historical practice and inspect and
 7 process asylum seekers as they arrived, utilizing established contingency plans
 8 created specifically for that purpose. Instead, Defendants turned asylum seekers back
 9 to Mexico.

10 **B. Defendants Adopt the Turnback Policy**

11 In early 2016, CBP undertook a construction project that cut the San Ysidro
 12 POE’s detention capacity for asylum seekers from approximately [REDACTED] to [REDACTED] Ex. 26
 13 at 002; Ex. 27 at 574-75 (noting that [REDACTED]
 14 [REDACTED]
 15 [REDACTED]).

16 That spring, the San Ysidro POE saw an increase in the number of asylum
 17 seekers seeking entry. Like all POEs, San Ysidro had well-worn plans for dealing
 18 with it. See, e.g., Ex 28 (Southwest Border contingency plan); Ex. 29 (San Ysidro
 19 POE activated its overflow contingency plan on March 25, 2016); Ex. 30 (Laredo
 20 Field Office contingency plan); Ex. 31 (Eagle Pass contingency plan); Ex. 32
 21 (Brownsville contingency plan). Indeed, despite the decrease in capacity due to the
 22 construction project, until May 2016, [REDACTED]
 23 [REDACTED]
 24 [REDACTED]. Ex. 33 at 444 (“[REDACTED]
 25 [REDACTED]”). On May 26, 2016, San Ysidro POE
 26 leadership wrote to CBP headquarters [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 [REDACTED]. Ex. 34 at 338-39; Ex. 35; Ex. 36 at 640 (May 27, 2016 report
 2 listing “[REDACTED] taken “[REDACTED]” at San Ysidro).
 3 Notably, at that time the leadership of the San Ysidro POE did not [REDACTED]
 4 [REDACTED]. Ex. 37
 5 at 023; Ex. 38 at 099.

6 It was not until the San Ysidro POE received media inquiries about asylum
 7 seekers at the port that CBP decided to abandon its existing contingency plans and
 8 began turning back asylum seekers instead. By May 26, 2016, CBP’s San Diego
 9 Field Office⁸ “[REDACTED]
 10 [REDACTED].” Ex. 39 at 741. On the same day, the offices of Senator
 11 Barbara Boxer and Representative Susan Davis asked questions about the asylum
 12 seekers at the San Ysidro POE. Ex. 40 at 870. In response to those inquiries, Sidney
 13 Aki, the Port Director of the San Ysidro POE, wrote, “[REDACTED]
 14 [REDACTED].” Ex. 41 at 552.

15 The next day, the San Ysidro POE began turning back asylum seekers that
 16 were in the process of arriving at the POE and preventing them from crossing the
 17 international boundary. *See* Ex. 42 (“[REDACTED]
 18 [REDACTED]”); Ex. 43 (“[REDACTED].”); Ex. 44 (“[REDACTED]
 19 [REDACTED].”); Ex. 45 (instructing CBP officers “[REDACTED]
 20 [REDACTED]”). However, San Ysidro POE leadership agreed that “[REDACTED]
 21 [REDACTED]” to inspect a few asylum seekers “[REDACTED].”
 22 Ex. 46. By the end of May 2016, CBP was [REDACTED]
 23 [REDACTED]
 24 [REDACTED]. Ex. 11 at 298.

25 But senior leadership at CBP was becoming increasingly impatient with
 26 asylum seekers being released into the U.S. rather than being turned back to Mexico.

27 _____
 28 ⁸ CBP’s Office of Field Operations has four field offices on the U.S.-Mexico border:
 San Diego, Tucson, El Paso, and Laredo.

1 Then-Deputy Commissioner of CBP, Kevin McAleenan, reacted to news that
 2 asylum seekers [REDACTED], “[REDACTED]
 3 [REDACTED]
 4 [REDACTED].” Ex. 47. Mr. McAleenan also expressed his
 5 frustration that “[REDACTED]
 6 [REDACTED].” *Id.* Defendants would later expand the turnback policy
 7 border-wide in the fall of 2016, with McAleenan playing a key role.

8 **C. Defendants Implement the Turnback Policy Border-Wide**

9 In the fall of 2016, Defendants again diverged from their historical practice
 10 and Congressional mandates. They began turning back asylum seekers at the
 11 Calexico West POE, in addition to the San Ysidro POE. *See* Ex. 48 at 086; Ex. 49 at
 12 715, 718. They did so despite knowing that the turnback policy had created a
 13 [REDACTED] in Tijuana, Mexico, and that there were already [REDACTED]
 14 [REDACTED]. *See, e.g.*, Ex. 50 at 746; Ex. 51 at
 15 438 (UNHCR urging CBP to “[REDACTED]”);
 16 Ex. 52 (DHS’s Office of Civil Rights and Civil Liberties “[REDACTED]
 17 [REDACTED]
 18 [REDACTED]” starting
 19 in July 2016); Ex. 53 at 294 (House Judiciary Committee [REDACTED]).

20 But by October 2016, Defendants had made plans to find a way to inspect and
 21 process asylum seekers arriving at POEs, instead of ignoring their statutory duty and
 22 turning back asylum seekers at POEs. On October 16, 2016, then-DHS Secretary Jeh
 23 Johnson and then-CBP Commissioner Gil Kerlikowske “[REDACTED]
 24 [REDACTED].” Ex. 54 at 340. On
 25 October 30, 2016, Commissioner Kerlikowske directed CBP “[REDACTED]
 26 [REDACTED]
 27 [REDACTED].” Ex. 55 at 175. In addition to the
 28 processing facilities in [REDACTED], Defendants began examining ways

1 to build other temporary processing facilities and expand detention capacity. On
 2 October 31, 2016, the Commissioner of CBP and the DHS Secretary “[REDACTED]”
 3 [REDACTED]
 4 [REDACTED].”⁹ *Id.* at 173. In particular, FEMA had identified
 5 [REDACTED]
 6 [REDACTED]. Ex. 56 at 316; Ex. 57 at 577-78 (“[REDACTED]”
 7 [REDACTED]” were “[REDACTED]”); Ex.
 8 58 (“[REDACTED]”
 9 [REDACTED]”).

10 On November 2, DHS explained that it [REDACTED]
 11 [REDACTED]
 12 [REDACTED]. Ex. 59. DHS also directed CBP “[REDACTED]”
 13 [REDACTED]
 14 [REDACTED].” Ex. 60.

15 Within days of that meeting, DHS outlined [REDACTED]
 16 [REDACTED]. Ex. 61. Then, CBP held
 17 an “[REDACTED]” with the management of OFO’s San Diego Field
 18 Office concerning [REDACTED]. Ex. 62.

19 On November 9, 2016, Donald Trump won the 2016 presidential election. Ex.
 20 63 at 1; Ex. 64 at 114:20-115:2. Within hours, CBP [REDACTED]
 21 [REDACTED]. Ex. 65 at 879; Ex. 66. At a
 22 meeting the next day, then-Deputy Commissioner McAleenan proposed “[REDACTED]”
 23 [REDACTED]
 24 [REDACTED].” Ex. 67 at 936. Shortly
 25 after the meeting, then-DHS Secretary Johnson approved [REDACTED]
 26 [REDACTED]. *Id.*; see also Ex. 68 at 880.

27
 28 ⁹ “FMUA” refers to family units. “UAC” refers to unaccompanied minors.

Todd Owen told McAleenan that he was “[REDACTED].” Ex. 6. However, Mr. Owen explained that he “[REDACTED] [REDACTED].” *Id.*; *see also* Ex. 69 at 935 (“[REDACTED] [REDACTED].”). Although CBP decided [REDACTED], each field office on the U.S.-Mexico border gave similar directions concerning turnbacks at POEs. William Brooks, Director of Field Operations for Tucson, instructed the port directors to, “[REDACTED] [REDACTED] [REDACTED].” Ex. 70; *see also* Ex. 13 at 607 (similar, Laredo Field Office); Ex. 71 at 496 (similar, El Paso Field Office). Finally, on November 15, 2016, CBP leadership [REDACTED]. Ex. 72 at 939. Thus, within a week of the 2016 presidential election, Defendants largely abandoned their Congressionally-mandated duty of inspecting and processing asylum seekers who were in the process of arriving at POEs, electing instead to expand turnbacks.

D. Defendants Knew that the Turnback Policy Violated the Law

Defendants implemented the turnback policy, despite acknowledging that it broke the law. In some cases, asylum seekers standing on U.S. soil were returned to Mexico. *See* Ex. 73 at Resp. 7; Ex. 74 at 450 (El Paso Field Office officials reported to CBP headquarters that “[REDACTED] [REDACTED]”). A CBP officer at the San Ysidro POE [REDACTED]. Ex. 8 at 045-046. At another POE, a CBP officer “[REDACTED].” Ex. 75 at 272. At the Hidalgo POE, “[REDACTED]” from the secondary inspection area to reduce the number of asylum seekers processed at the port. Ex. 3 at 157:15-18; *see also* Ex. 76 at 113; Ex. 14 at 96:17-99:6 (Nogales POE

1 [REDACTED].

2 In the Laredo Field Office, multiple CBP officers observed asylum seekers
3 being returned from U.S. territory to Mexico without being processed. Ex. 77 at 136.
4 The CBP officers who witnessed these turnbacks summarized them in emails sent to
5 Chapter 149 of the National Treasury Employees Union (“NTEU”).¹⁰ *See, e.g.*, Ex.
6 78 at 139-40. NTEU Chapter 149 sent a letter to the director of the Pharr POE, to
7 invoke a Step 1 grievance concerning “the Agency . . . unilaterally implement[ing]
8 a policy that prevents and/or blocks CBP Officers . . . from processing political
9 asylum seekers.” Ex. 79 at 142-43. During a grievance meeting with representatives
10 of the NTEU, CBP “*acknowledged that*” the turnback policy “*broke . . . Federal*
11 *immigration rules and Laws.*” Ex. 2 at 0132 (emphasis added). Although CBP
12 officials would freely state that the turnback policy violated the law in conversations,
13 they refused to say so in writing. Ex. 3 at 125:17-21. Eventually, NTEU Chapter 149
14 asked then-CBP Commissioner McAleenan to provide the legal authority to support
15 CBP’s “instructions to return individuals who enter the U.S. and request asylum back
16 to Mexico without” being processed. Ex. 76 at 110.

17 **E. Defendants Memorialize Aspects of the Turnback Policy**

18 In 2018,¹¹ Defendants memorialized aspects of the turnback policy in writing.
19 On April 23, 2018, “[REDACTED]
20 [REDACTED].” Ex. 80 at 784. On
21 April 24, 2018, CBP Commissioner McAleenan directed his deputies to “[REDACTED]
22 [REDACTED].” Ex. 81 at 778. Then, on April 27, 2018,
23 CBP issued its metering guidance memorandum, which was distributed to the four
24 Directors of Field Operations who oversee the operations of all POEs on the U.S.-
25

26 ¹⁰ The NTEU represents CBP officers in the Laredo Field Office.

27 ¹¹ In 2017, as the number of asylum seekers arriving at POEs on the U.S.-Mexico
28 border declined precipitously, *see* Dkt. 390-91 at ¶¶ 5, 8, CBP continued to turn back
asylum seekers arriving at those POEs, *see* Ex. 18 (April 2017 recording of turnback
where an asylum seeker was told to “go back to Mexico.”), Ex. 17 at 307:8-308:8.

1 Mexico border. Ex. 82. Under the metering policy, Directors of Field Operations are
 2 permitted to “meter the flow of travelers at the land border” between the U.S. and
 3 Mexico. *Id.* When “metering” is in place, CBP officers tell “waiting travelers that
 4 processing at the port of entry is currently at capacity and CBP is permitting travelers
 5 to enter the port once there is sufficient space and resources to process them.” *Id.*

6 Although the policy was supposed to address “[REDACTED],” Ex. 83 at 332,
 7 there was no appreciable surge in asylum seekers in April 2018. For example, at the
 8 San Ysidro POE, on April 24, 2018, [REDACTED]
 9 [REDACTED]. Ex. 84. On April 27-28, 2018, the port
 10 still had [REDACTED]. Ex. 85 at 719-720; Ex. 86 at 722-23; Ex. 87 at
 11 759. On April 29, 2018, San Diego Director of Field Operations, Pete Flores, wrote
 12 to Kevin McAleenan that “[REDACTED]”
 13 POE. Ex. 88 at 694. Ultimately, the April 2018 migrant caravan largely fizzled.
 14 Mexican migration authorities “[REDACTED]” as soon as it “[REDACTED]
 15 [REDACTED]” to “[REDACTED].” Ex. 89.¹²

16 Because the low numbers of caravan members at the border could not justify
 17 border-wide turnbacks, DHS began writing guidance on turning back asylum seekers
 18 to permit turnbacks to occur outside of “surge events.” In late May 2018, DHS
 19 Secretary Nielsen began considering a “prioritization-based queue management”
 20 approach that would allow port directors to turn back asylum seekers, purportedly
 21 as a matter of “discretion,” on the basis of amorphous considerations related to port
 22 capacity and resources. During a May 24, 2018 meeting, DHS Secretary Nielsen
 23

24 ¹² Even though the turnback policy would later create a queue of asylum seekers in
 25 Tijuana, Mexico much larger than the number of asylum seekers who might
 26 approach the port on a typical day, CBP privately acknowledged that [REDACTED]
 27 [REDACTED]. For example, in its normal
 28 posture, the San Ysidro POE can process approximately [REDACTED] asylum cases per day.
 Ex. 90 at 246; Ex. 91 at 676 (CBP could have cleared the queue existing on
 November 9, 2018 in “[a]pproximately 11 days”). Even with no additional resources,
 the San Ysidro POE estimated that [REDACTED] Ex. 92 at 964.

1 “ [REDACTED]
 2 [REDACTED]
 3 [REDACTED]?” Ex. 93 at 317. In response, OFO’s San Diego Field Office indicated that [REDACTED]
 4 [REDACTED]
 5 [REDACTED] s. *Id.* at 316. OFO’s
 6 El Paso Field Office reported that [REDACTED]
 7 [REDACTED] Ex. 94 at 575. The Tucson Field Office said that it
 8 could [REDACTED]. Ex. 95. Synthesizing this information,
 9 Todd Owen reported to CBP Commissioner McAleenan that [REDACTED]
 10 [REDACTED]
 11 [REDACTED] Ex. 96. However, he warned that this policy would result in “[REDACTED]
 12 [REDACTED]
 13 [REDACTED].” *Id.* [REDACTED]
 14 [REDACTED]. Ex. 97. On June 5,
 15 2018, Defendants adopted the prioritization-based queue management policy. Ex. 98
 16 at 294. The policy directs POEs to focus on other missions, such as inspecting
 17 incoming food and other cargo, instead of processing asylum seekers. *Id.* at 296.

18 **F. Defendants Begin Using “Operational Capacity” As a Metric**

19 At the same time, CBP began using a new metric to justify its turnbacks of
 20 asylum seekers. While the “[REDACTED]” for implementing the April 2018
 21 metering policy was “detention capacity” (*i.e.*, the number of persons who can be
 22 held at a POE, Ex. 17 at 158:4-7), in June 2018, CBP began using “operational
 23 capacity” as its stated metric to justify turning back asylum seekers. Ex. 99 at 864.
 24 This change was significant. Detention capacity is a known, quantifiable number
 25 that CBP regularly tracks. *See* Ex. 4 at 105:11-106:14; Ex. 10 at 185:9-20. On the
 26 other hand, operational capacity has no definition and is not tracked by CBP. Ex. 10
 27 at 74:11-76:15, 189:8-191:6. Defendants thus shifted from the measurable metric of
 28 detention capacity to an unmeasurable and pretextual metric of operational capacity,

1 in order to “[REDACTED].” Ex. 100 at 207:7-14.

2 “Operational capacity,” as Defendants use the term, is essentially a fiction.

3 [REDACTED]—after the
4 turnback policy was already in effect and this litigation was filed. Ex. 100 at 161:8-
5 10. The distinction between detention capacity and operational capacity is not
6 memorialized in any statute, regulation, guidance, memorandum, or official
7 document. Ex. 17 at 68:8-71:24; Ex. 100 at 161:20-162:12. [REDACTED]

8 [REDACTED]
9 [REDACTED]. Ex. 17 at 102:13-111:11; *see also* Ex. 101. In fact, the term
10 “operational capacity” has no concrete definition. Ex. 17 at 73:6-11, 110:24-111:11.
11 CBP never even wrote down the factors that a port director should consider when
12 determining a POE’s operational capacity. *Id.* at 111:13-112:13; Ex. 14 at 292:13-
13 15. CBP did not track operational capacity at any of its ports. Ex. 102 at 66:10-25.
14 CBP has no way of reconstructing what the operational capacity of a POE would
15 have been at any given time. Ex. 17 at 129:7-14; Ex. 14 at 106:20-107:7. In the end,
16 operational capacity is what the port director says it is, without any reference to a
17 port’s actual holding space. Ex. 100 at 181:22-182:4; *see also* Ex. 14 at 140:19-21
18 (“[REDACTED]
19 [REDACTED].”); Ex. 103 at 57:2-20.

20 The reason that Defendants changed the metric they used to justify metering
21 is no secret. According to CBP’s daily capacity figures, POEs routinely operated
22 below capacity. *See* Ex. 20 at ¶¶ 22, 101-23. Contemporaneous reports also show
23 that the number of asylum seekers detained at POEs [REDACTED]
24 [REDACTED]. *See* Exs. 14-15, 17-19. Once CBP enabled port directors to ignore
25 the actual capacity of their POEs, [REDACTED]
26 [REDACTED]. *See, e.g.,* Ex. 12 at 742 (San Ysidro POE had a “[REDACTED]
27 [REDACTED]”); Ex. 104 ([REDACTED]
28 [REDACTED]”); Ex. 105 (CBP sent guidance about “[REDACTED]

1 [REDACTED]).

2 As the turnback policy was rolled out border-wide, POEs tracked [REDACTED]
 3 [REDACTED]. *See*,
 4 *e.g.*, Ex. 106 at 089 (“[REDACTED]
 5 [REDACTED]”); Ex. 107 at 2 (internal CBP study
 6 analyzing whether [REDACTED]); Ex. 108
 7 (“[REDACTED]”).

8 Defendants refused to implement plans that could have considerably increased
 9 the capacity of POEs to process asylum seekers. For instance, in November 2018,
 10 Pete Flores, the Director of Field Operations for OFO’s San Diego Field Office,
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]. Ex.
 14 109; Ex. 110. DHS Secretary Nielsen [REDACTED]
 15 [REDACTED] Ex. 111.

16 CBP also considered whether [REDACTED]
 17 [REDACTED]
 18 [REDACTED]. Ex. 112. However, [REDACTED]
 19 [REDACTED] *Id.*

20 **G. Defendants Harmed the Class and Al Otro Lado**

21 The turnback policy seriously harmed asylum seekers, returning them to
 22 Mexican border cities that Defendants knew were dangerous. *See* Ex. 96 (“[REDACTED]
 23 [REDACTED]
 24 [REDACTED]”); Ex. 100 at 202:24-203:5; Ex. 50 at 746 (report
 25 indicating that turnbacks were “[REDACTED]” in Tijuana). In
 26 response to “the needs of particularly vulnerable migrants who ha[d] been metered[,
 27 s]pecifically those who are in imminent danger of harm or death in Tijuana,”
 28 Plaintiff Al Otro Lado, as the only organization that offered comprehensive,

1 emergency services to migrants in Tijuana, found itself “constantly having to pull
2 resources from [its] other offices” to address those needs. Ex. 113 at 92:12-96:4. The
3 need to provide services in Tijuana to asylum seekers who had been turned back
4 strained Al Otro Lado’s resources and frustrated its other missions, including its
5 deportee program and medical-legal program. *Id.* at 153:3-154:23.

6 Moreover, turnbacks were responsible for the deaths of asylum seekers. Ex.
7 113 at 161:25-162:9 (discussing murders of and assaults on unaccompanied minors
8 who were turned back). For example, on June 23, 2019, CBP officers turned back
9 Oscar Alberto Martinez Ramirez, his wife, and their 23-month-old daughter, Valeria,
10 when they attempted to enter the U.S. at the Brownsville POE. Ex. 114 at 139; *see*
11 *also* Ex. 115 at 64. There was no reason to turn the family back; the Brownsville
12 POE was operating at only █% capacity that day. Ex. 115 at 64. After aid workers
13 in Matamoros told Oscar there were hundreds of people in front of him waiting to
14 be processed at the Brownsville POE, *id.*, Oscar waded into the Rio Grande River
15 near the Brownsville POE with his daughter on his back. *Id.* The rapid current swept
16 Oscar off his feet and pulled him and Valeria under. Ex. 115 at 139. They drowned.
17 *Id.* When their bodies washed up along the U.S. side of the riverbank, Valeria’s hand
18 was wrapped around her father’s shoulders. *Id.*



MEMO OF P. & A. IN SUPP. OF
PLTFS’ MOT. S.J.

1 Ex. 116.

2 Defendants take no responsibility for the harm they have caused. When Todd
3 Owen was asked, “Do you take responsibility for instances where the metering
4 policy was implemented in ways that broke the law?”, he answered, “I do not take
5 responsibility for the 30,000 officers that work under me.” Ex. 10 at 239:22-240:6.
6 When asked whether he takes responsibility for asylum seekers staying in squalid
7 conditions at migrant shelters in Mexico as a result of his turnback policy, Mr. Owen
8 answered, “No.” *Id.* at 289:14-17. When asked whether he took any responsibility
9 for parents who were sleeping on the street in Mexico with toddlers in temperatures
10 over 100 degrees as a result of the turnback policy, Mr. Owen answered, “No.” *Id.*
11 at 291:15-20. And finally, when he was asked whether he took any responsibility for
12 the death of Oscar Alberto Martinez Ramirez and his two-year-old daughter, Mr.
13 Owen answered, “No.” *Id.* at 292:13-21.

14 **III. LEGAL STANDARD**

15 Summary judgment should be granted where the moving party demonstrates
16 there “is no genuine issue as to any material fact and [it] is entitled to judgment as a
17 matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R.
18 Civ. P. 56(c)). Upon such a showing, the burden shifts to the nonmoving party to
19 “come forth with specific facts to show that a genuine issue of material fact exists.”
20 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). On cross-motions for
21 summary judgment, a court “must consider each motion separately ‘on its own
22 merits’ to determine whether any genuine issue of material fact exists.” *Allstate Ins.*
23 *Co. v. Farmers Ins. Exch.*, 2008 WL 11508663, *3 (S.D. Cal. 2008).

24 **IV. ARGUMENT**

25 **A. The Turnback Policy Violates the APA and INA**

26 Section 706 of the APA directs courts to “compel agency action unlawfully
27 withheld” and to “hold unlawful and set aside agency action” that is “not in
28 accordance with law,” “in excess of statutory jurisdiction, authority, or limitations,”

1 or otherwise “arbitrary, capricious [or] an abuse of discretion.” 5 U.S.C. § 706(1),
 2 (2)(A), (C). The turnback policy is a final agency action that is unlawful and must
 3 be set aside under those standards. **First**, as this Court recognized, the policy violates
 4 the specific mandates in the INA governing how Defendants must treat arriving
 5 noncitizens at POEs. Similarly, each instance when a class member is turned back
 6 amounts to the unlawful withholding of agency action. **Second**, as this Court
 7 likewise recognized, the policy violates the statutory scheme Congress created to
 8 ensure access to the asylum process for noncitizens at POEs. **Third**, the policy is
 9 arbitrary, capricious, and an abuse of discretion because Defendants’ stated
 10 justification is a pretext, the real reasons for the policy are unlawful, and the policy
 11 is at odds with congressional intent.

12 **a. The turnback policy is a final agency action**

13 The APA permits judicial review over agency actions that are “final.” 5 U.S.C.
 14 § 704; *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017).
 15 Agency action is “final” when (1) it “mark[s] the ‘consummation’ of the agency’s
 16 decisionmaking process” and (2) as a result of the action, “‘rights or obligations have
 17 been determined,’ or ... ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S.
 18 154, 177-78 (1997). The turnback policy, under which CBP officers at POEs along
 19 the U.S.-Mexico border restrict the flow of asylum seekers by turning them back to
 20 Mexico, fulfills both requirements. *See* Dkt. 280 at 49-54 (concluding Plaintiffs’
 21 allegations, which the evidence now substantiates, satisfy the *Bennett* test).

22 The turnback policy satisfies the finality test’s first prong because it reflects a
 23 “conscious” and “deliberate decision” by Defendants, *ONRC Action v. Bureau of*
 24 *Land Mgmt.*, 150 F.3d 1132, 1137 (9th Cir. 1998), and is “an active program
 25 implemented by the agency.” *Wagafe v. Trump*, 2017 WL 2671254, at *10 (W.D.
 26 Wash. 2017); *see R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) (an
 27 implemented policy directing an ongoing practice affecting individual cases is final
 28 agency action).

Defendants first began turning back asylum seekers at the San Ysidro POE in May 2016. In the fall of 2016, Defendants expanded the turnback policy to other POEs along the U.S.-Mexico border. Both decisions amounted to “conscious” and “deliberate” choices by Defendants to reject their standard contingency plans and pursue a different option. *See supra* at 9-12, 13-15; Ex. 110; Ex. 111; Ex. 112; Ex. 65 at 879; Ex. 66; Ex. 67 at 936; *ONRC Action*, 150 F.3d at 1137. Defendants previously had plans to utilize temporary facilities near POEs to fulfill their congressionally-mandated duty to inspect and process asylum seekers, yet they abdicated this duty following the 2016 election by expanding the turnback policy. *See supra* at 9-12; Ex. 54 at 340; Ex. 55 at 173; Ex. 67 at 936. On the instruction of the DHS Secretary and the CBP Commissioner, OFO leadership instructed the Directors of Field Operations overseeing POEs along the southern border to coordinate with Mexican government officials to begin metering. *See supra* at 11; Ex. 67 at 936.

Then, in April and June 2018, Defendants memorialized aspects of the turnback policy in formal guidance documents. *See supra* at 12-14; Ex. 85; Ex. 98 at 294. CBP also disseminated instructions to POEs requiring them to meter asylum seekers, assign staff to “limit line” positions to prevent asylum seekers from entering U.S. territory, and avoid surpassing an arbitrary cap on POEs’ detention capacity. *See, e.g.*, Ex. 14 at 74:2-8; Ex. 117 (“holding at the line will soon become the norm so all along the SW border need to act the same so the NGOs don’t try to play one port against the other.”). The implementation of the policy has been confirmed by high-level government officials, as well as CBP officers with firsthand experience implementing it. *See supra* at 9-16; Ex. 1 at 100:25-101:6; Ex. 2 at 132. Defendants’ top-down, calculated efforts to restrict the flow of asylum seekers leaves no doubt that it “mark[s] the ‘consummation’ of the agency’s decisionmaking process.” *Bennett*, 520 U.S. at 177-78.

With respect to the second prong, legal consequences flow from the turnback

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1 policy because it instructs CBP officers to reject asylum seekers at POEs and deny
 2 them access to the asylum process, in contravention of their mandatory statutory
 3 duties. Asylum seekers are forced to wait in dangerous Mexican border towns, where
 4 they risk grave harm or even death. *See infra* at 16-18. Many are ultimately deprived
 5 of any ability to access the asylum process at a POE as a result of the policy. *See,*
 6 *e.g.*, Dkt. 390-75 at ¶ 6 (Roberto Doe was turned back from Hidalgo POE); Dkt.
 7 390-97 at ¶¶ 6-7 (Roberto Doe was subsequently deported from Mexico). These
 8 “actual or immediately threatened effect[s]” satisfy the finality test’s second prong.
 9 *Lujan v. Nat’l Wildlife Federation*, 497 U.S. 871, 894 (1990); *Wagafe*, 2017 WL
 10 2671254, at *10 (action was final when policy resulted in “thousands of . . . qualified
 11 applications [being] allegedly indefinitely delayed or denied”).

12 **b. The policy directs CBP officers to unlawfully withhold a**
 13 **discrete, mandatory ministerial action**

14 Congress has spoken clearly about what Defendants are required to do when
 15 noncitizens come to POEs—inspect them when they arrive and allow those seeking
 16 asylum to access the asylum process. *See* 8 U.S.C. §§ 1158(a)(1), 1225(a)(1), (3),
 17 and (b)(1)(A)(ii). Because Defendants have a discrete mandatory duty to inspect and
 18 refer asylum seekers arriving at POEs, *see* Dkt. 280 at 31-46; 8 U.S.C. § 1225, each
 19 turnback amounts to the unlawful withholding of mandatory agency action. 5 U.S.C.
 20 § 706(1). Moreover, the turnback policy—which is an overarching agency policy
 21 directing this unlawful withholding of mandatory action—is “not in accordance with
 22 law” and is “in excess of statutory jurisdiction, authority, or limitations.” *Id.* §
 23 706(2)(A), (C).

24 Section 706(1) of the APA requires a court to “compel agency action
 25 unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). Agency actions
 26 that are “legally required,” *i.e.*, that are “ministerial or non-discretionary,” are
 27 subject to § 706(1), and courts may compel them as in a mandamus action. *Norton*
 28 *v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004). Section 706(2) of the APA

1 directs the court to “hold unlawful and set aside agency action,” 5 U.S.C. §
 2 706(2)(A), (C), that is “contrary to clear congressional intent” or “inconsistent with
 3 the statutory mandate,” or that “frustrate[s] the policy that Congress sought to
 4 implement.” *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep’t of*
 5 *Health & Human Servs.*, 946 F.3d 1100, 1112 (9th Cir. 2020) (quotations omitted).

6 This Court previously concluded that “the mandatory duties to inspect all
 7 aliens and refer certain aliens seeking asylum are discrete actions for which this
 8 Court can compel Section 706(1) relief under 8 U.S.C. § 1225(a)(3), 8 U.S.C.
 9 § 1225(b)(1)(a)(ii), and 8 C.F.R. § 235.3(b)(4).” Dkt. 280 at 31. Defendants’ duty to
 10 inspect and refer applies to those “who are in the process of arriving in the United
 11 States,” including those who may not yet have set foot across the physical border.
 12 Dkt. 280 at 46. The Ninth Circuit found this analysis “sound and persuasive.” *Al*
 13 *Otro Lado v. Wolf*, 952 F.3d 999, 1011-12 (9th Cir. 2020). The Court’s prior
 14 conclusion stems directly from a straightforward interpretation of sections 1158 and
 15 1225 of the INA, aided by traditional canons of statutory construction and
 16 Defendants’ own regulations. *See* Dkt. 280 at 31-46. Similarly, the turnback
 17 policy—a policy to evade those mandatory duties—is “contrary to clear
 18 congressional intent” and “inconsistent with the statutory mandate,” and would
 19 “frustrate the policy that Congress sought to implement.” *Planned Parenthood*, 946
 20 F.3d at 1112.

21 Summary judgment is warranted on Plaintiffs’ 706(1) and 706(2) claims
 22 because it is undisputed that Defendants have a policy of turning back asylum
 23 seekers and refusing to inspect and process them when they are arriving at POEs
 24 along the U.S.-Mexico border, and that they do so to individual asylum seekers. As
 25 CBP’s Rule 30(b)(6) witness, Randy Howe, conceded:

26 Q. Is it the case currently that when a port is engaged in metering,
 27 when a noncitizen without proper travel documents arrives at the
 28 border, they will be told that the port is at capacity and they

1 should return to be processed later?

2 A. Yes.

3 Ex. 4 at 171:7-13; Ex. 17 at 201:22-202:3. A second Rule 30(b)(6) witness, Mariza
4 Marin, admitted that asylum seekers approaching POEs are attempting to enter the
5 United States:

6 Q. Okay. In your experience[], are asylum seekers who are at the
7 border between the United States and Mexico attempting to enter
8 the United States at a port of entry?

9 A. Yes.

10 Ex. 17 at 201:22-202:3 (objection omitted).¹³ Thus, Defendants have admitted that
11 it is their policy to turn back asylum seekers who are in the process of arriving in the
12 United States. Dkt. 280 at 31-46; *see also Al Otro Lado*, 952 F.3d at 1012.¹⁴

13 Defendants also turned back to Mexico asylum seekers who were standing *on*
14 *U.S. soil*. *See, e.g.*, Ex. 1 at 97:14-18; Ex. 3 at 61:13-16; Ex. 73 at Resp. 7; Ex. 74
15 at 450; Ex. 8 at 045-046; Ex. 14 at 141:6-142:23; Ex. 102 at 205:16-206:11. No
16 statutory analysis of the term “arriving in” is required to determine that CBP broke
17 the law by turning back asylum seekers *who were already on U.S. soil*.

18 Plaintiffs are thus entitled to an order compelling Defendants to comply with
19 their mandatory, ministerial inspection and processing duties set out in § 1225. *See*
20 5 U.S.C. § 706(1). Furthermore, it is undisputed that it is agency policy to withhold
21 these mandatory actions, and therefore the Court should set aside the policy because
22 it is incompatible with applicable law. *See id.* § 706(2)(A), (C).

23
24
25 ¹³ A third CBP witness testified that when CBP tells an asylum seeker to wait in
26 Mexico because the POE is “at current capacity,” “there’s no guarantee” “ever
implied” that “at some point in the future, [the asylum seeker] might be processed.”
Ex. 14 at 234:25-235:20.

27 ¹⁴ To the extent the turnback policy purports to grant POEs discretion to turn back
28 asylum seekers, *see e.g.* Ex. 98, the policy is unlawful because, as the Court has
stated, the duty to inspect and process asylum seekers is mandatory. *See* Dkt. 280
at 29.

c. The policy contravenes Congress’ unambiguous statutory scheme and exceeds Defendants’ authority

Even if CBP’s ministerial duties to inspect and process were not triggered until an asylum seeker steps onto U.S. soil, summary judgment is still warranted on Plaintiffs’ § 706(2) claim because the turnback policy contravenes Congress’ statutory scheme governing inspection at POEs and exceeds Defendants’ statutory authority. “[A]n agency’s power is no greater than that delegated to it by Congress.” *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014) (“[A] core administrative-law principle [is] that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”). In particular, agencies lack authority to “abandon” a “detailed scheme” established by Congress if they think it is not working well. *EBSC v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018). Because Congress designed a “statutory scheme” by which all noncitizens are to be inspected at POEs and asylum seekers must be referred for credible fear interviews, Dkt. 280 at 62, Defendants have no authority to turn back any noncitizens at POEs, much less single out asylum seekers for such treatment. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1747 (2020) (when Congress makes a “broad rule” and includes no exceptions, the rule applies and no “tacit exception” may be inferred).¹⁵

Since 2016, it has been Defendants’ policy to turn back asylum seekers at POEs. *See, e.g., supra* at 7-14; Ex. 4 at 171:7-13; Ex. 10 at 102:21-103:22; Ex. 93 at 317; Ex. 94 at 575; Ex. 95; Ex. 96. Asylum seekers are turned back when they are

¹⁵ Even if the Court were to reject its prior conclusion that Defendants’ duties to inspect and refer attach to individual asylum seekers in the process of arriving in the United States at a POE who may not have stepped across the international border, the Court could still “hold unlawful and set aside” Defendants’ *policy* to turn back such asylum seekers. 5 U.S.C. § 706(2). Any such policy runs counter to the statutory scheme, and thus is “contrary to clear congressional intent” and “inconsistent with the statutory mandate” of inspecting all noncitizens at POEs and referring all asylum seekers for credible fear interviews, even if asylum seekers whom the government prevents from accessing U.S. territory cannot enforce those duties via a § 706(1) claim. *Planned Parenthood*, 946 F.3d at 1112.

1 “attempting to enter the United States at a [POE].” Ex. 17 at 201:22-202:3. CBP
 2 officers at POEs physically block those perceived to be asylum seekers—and only
 3 asylum seekers—from crossing the border, and tell them “that the port is at capacity
 4 and they should return to be processed later.” Ex. 4 at 171:7-13; Ex. 14 at 232:8-15
 5 (acknowledging that “officers staffing the limit line are directed to prevent migrants
 6 from crossing [the] international boundary,” “because once they do cross the
 7 boundary, then they have to be processed”).

8 The formulation of policies “prescrib[ing] the terms and conditions upon
 9 which [noncitizens] may come to this country” “is entrusted exclusively to
 10 Congress,” not the executive. *Kleindienst v. Mandel*, 408 U.S. 753, 766-67 (1972);
 11 *see also* Dkt. 280 at 23 (“[O]ver no conceivable subject is the legislative power of
 12 Congress more complete than it is over the admission of [noncitizens].”). Here,
 13 Defendants claim that they have the power to selectively screen out asylum seekers
 14 and deny them processing. The logical result of Defendants’ argument is that they
 15 would have sole authority to end asylum for noncitizens arriving at POEs, without
 16 any involvement by Congress—an interpretation of the INA that plainly conflicts
 17 with Congress’ statutory scheme. *See* 5 U.S.C. § 706(2)(A), (C).¹⁶

18 Defendants may not usurp Congress’ role in this way. Because Congress
 19 never authorized Defendants to turn back any noncitizens at POEs, and in fact
 20 created a statutory scheme that “specifically addresse[s]” how Defendants must treat
 21 individuals who are coming to POEs to seek asylum, *EBSC v. Barr*, 964 F.3d 832,
 22 848 (9th Cir. 2020), the turnback policy is “not in accordance with law” and is “in
 23 excess of statutory . . . authority,” 5 U.S.C. § 706(2)(A), (C).

24
 25
 26 ¹⁶ CBP’s general power to operate POEs does not include authority to contravene
 27 more specific provisions of the INA. “[I]t is a commonplace of statutory construction
 28 that the specific governs the general,” particularly where “Congress has enacted a
 comprehensive scheme and has deliberately targeted specific problems with specific
 solutions.” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645
 (2012) (citations omitted).

d. The Turnback Policy is arbitrary and capricious

In addition to the turnback policy's categorical incompatibility with the INA, the policy is also illegal under APA § 706(2)(A) because it is "arbitrary, capricious, [and] an abuse of discretion" for a number of reasons, each of which provides an independent basis to grant Plaintiffs' motion.

i. The Turnback Policy Is Based On Pretext

It is arbitrary and capricious for an agency to "offer[] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) (citation omitted). "[A]gencies [must] offer genuine justifications for important decisions." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). An agency is due no deference when the explanation provided for its action "lacks any coherence." *Tripoli Rocketry Ass'n, Inc. v. ATF*, 437 F.3d 75, 77 (D.C. Cir. 2006). Courts must not "simply accept whatever conclusion an agency proffers merely because the conclusion reflects the agency's judgment." *Id.* "[R]easoned decisionmaking" is required. *Id.* Similarly, an agency action cannot survive APA review if it is supported only by post hoc rationalizations. *DHS v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1907-09 (2020).

The undisputed evidence shows that Defendants' stated justification for the turnback policy—a "lack of capacity" at POEs, Dkt. 283 ¶ 7—is pretextual. CBP's own daily internal statistics capturing "capacity" show that POEs generally operated well below 100% during the policy's implementation and that the number of asylum seekers at POEs [REDACTED]. See Ex. 20 at ¶¶ 22, 101-23; Ex. 21; Ex. 22; Ex. 23 Ex. 24; Ex. 25. Indeed, a CBP officer at the Tecate POE testified that this "capacity excuse" is a lie:

Q. And when [your supervisors] said the port was at capacity, you knew that was a lie, right?

1 A. Yes.

2 Q. And it would have been obvious to those supervisors that it was
a lie as well, correct?

3 A. Correct.

4 Q. In fact, it was obvious to everybody that was implementing the
policy at [the] Tecate [POE] that the capacity excuse was a lie,
5 right?

6 A. Correct.

7 Ex. 1 at 100:22-101:6. Meanwhile, CBP “[REDACTED]
8 [REDACTED]
9 [REDACTED].” Ex. 118 at 93:4-12. At the Hidalgo POE, CBP “[REDACTED]
10 [REDACTED]” from the port’s secondary inspection area, “[REDACTED]
11 [REDACTED].” Ex. 3 at 157:15-18. A CBP officer
12 from the Laredo Field Office testified that there was no justification for metering
13 because CBP could process asylum seekers in the order that they came to a POE
14 without resorting to turnbacks. *Id.* at 71:9-16. Finally, prior to issuing the
15 prioritization-based queue management guidance, then-DHS Secretary Nielsen
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]. *Supra* at 13-14.

19 If there really were capacity issues, Defendants have long had contingency
20 plans ready to obviate any genuine need to turn back asylum seekers. Yet Defendants
21 have repeatedly [REDACTED]
22 [REDACTED]. *See, e.g.*, Ex. 65 at 879; Ex. 66; Ex. 14
23 at 156:12-157:22; *supra* at 10-11. Moreover, Defendants have always had the power
24 to release asylum seekers from POEs rather than waiting for ICE to pick up and
25 transfer them to a detention facility. *See, e.g.*, Ex. 119 at 545 (DHS Secretary
26 Johnson [REDACTED] in fall 2016 [REDACTED]
27
28

1 [REDACTED].¹⁷ [REDACTED]
 2 [REDACTED]
 3 [REDACTED]. *See, e.g.,*
 4 Ex. 3 at 157:15-18; Ex. 14 at 96:17-99:6.

5 In June 2018—well after this litigation began—CBP began using “operational
 6 capacity,” as opposed to “detention capacity,” as its justification for turnbacks. *See*
 7 *supra* at 14-16. The new metric, “operational capacity,” has no definition and is
 8 not—and has never been—tracked, and it is impossible to reconstruct a port’s
 9 operational capacity. *See supra* at 14-15. “Operational capacity” means w [REDACTED]
 10 [REDACTED]
 11 [REDACTED]. Ex. 100 at 181:22-182:4; *see also* Ex.
 12 14 at 140:19-21. “Operational capacity” as a reason for turning back asylum seekers
 13 “lacks any coherence,” and is anything but a “concrete standard.” *Tripoli Rocketry*,
 14 437 F.3d at 77. Defendants have offered no contemporaneous data or documents to
 15 support an “operational capacity” defense. *Id.* Reliance on the “operational capacity”
 16 concept demonstrates a lack of “reasoned decisionmaking” and is therefore arbitrary
 17 and capricious. *Id.*

18 The shift to “operational capacity” simply resulted in [REDACTED] “
 19 [REDACTED].” Ex. 100 at 207:7-14. Around the same time, Defendants issued the
 20 prioritization-based queue management memo. *See* Ex. 98 at 294. The memo
 21 purports to give port directors “discretion” not to inspect and process asylum seekers
 22 at all.¹⁸ *Id.* at 296 (“Field leaders have the discretion to allocate resources and staffing
 23 dedicated to any areas of enforcement and trade facilitation not covered by the
 24 _____

25 ¹⁷ “NTA” refers to a “notice to appear,” which institutes removal proceedings in
 26 immigration court. *See* 8 U.S.C. § 1229(a)(1).

27 ¹⁸ While the June 2018 memo on its face grants POEs discretion to meter asylum
 28 seekers or not, CBP subsequently directed POEs to undertake metering. *See, e.g.,*
 Ex. 14 at 93:2-24:1 [REDACTED]
 [REDACTED].

[specified] priorities and queue management process based on the availability of resources and holding capacity at the local port level.”). The combination of “operational capacity” and “prioritization-based queue management” meant that POEs could rely on CBP’s explicit policies to justify not inspecting and processing any asylum seekers at all, independent of the actual availability of processing or detention capacity at a given POE. Indeed, after June 2018, POEs set [REDACTED]

See supra at 15-16.

Defendants’ sole stated rationale for the turnback policy—that they lacked “capacity” to inspect and process asylum seekers—has always been pretextual. When CBP officers told asylum seekers at POEs that they could not be processed due to lack of “capacity” under the turnback policy, these were “obvious” “lies” in violation of APA § 706(2)(A). Ex. 1 at 99:19-101:2. As a whistleblower testified, metering is “a solution in search of a problem.” *Id.* at 153:24-154:1. This is textbook arbitrary and capricious action. *See DHS*, 140 S. Ct. at 1907-09 (post hoc rationalization violates § 706(2)(A)).

ii. The True Motivations for Metering Are Unlawful

Defendants needed to fabricate a seemingly legitimate excuse to turn back asylum seekers from POEs because their true motivations—limiting access to the asylum process, deterring asylum seekers from seeking protection in the U.S., and evading a statutory command—are arbitrary and capricious and an abuse of discretion. It is a violation of § 706(2)(A) for an agency to “rel[y] on factors which Congress has not intended it to consider.” *Locke*, 776 F.3d at 994 (citation omitted).

A desire to limit access to the asylum process at POEs for its own sake is not a legitimate basis for the turnback policy. *See* Dkt. 280 at 63 (explaining that unlike the statutory numerical limit on refugee admissions, the INA does not cap the number of people who may access the asylum process at ports, and a “*de facto* numerical limit” would be “unlawful”). The undisputed facts are that Defendants

1 nonetheless proceeded with the turnback policy in pursuit of this purpose. *See, e.g.,*
 2 Ex. 47 (McAleenan, who ultimately proposed the turnback policy, [REDACTED]
 3 [REDACTED]
 4 [REDACTED]); Ex. 96 (prior to implementing prioritization-based queue
 5 management, CBP leadership [REDACTED]
 6 [REDACTED]).

7 In addition, deterring lawful migration is not a proper basis for the turnback
 8 policy, yet deterrence has always been at the core of the policy. In fall 2016, CBP
 9 put out a call for proposals “[REDACTED]
 10 [REDACTED].” Ex. 57 at 577-578. In November of that year, McAleenan proposed
 11 [REDACTED]. Ex. 67 at 936; Ex. 68 at 880.
 12 After the turnback policy’s adoption, Defendants sought to determine whether [REDACTED]
 13 [REDACTED]. *See, e.g.,*
 14 Ex. 109 at 2. As this Court has correctly observed, “there is no room for deterrence
 15 under the scheme Congress has enacted.” Dkt. 280 at 65; *see also Locke*, 776 F.3d
 16 at 994; *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 154 (D.D.C. 2018) (finding
 17 challenge to a policy that took deterrence into account showed a likelihood of
 18 success on the merits by “demonstrat[ing] the incompatibility of the deterrence
 19 policy and [applicable law]”); *R.I.L.-R*, 80 F. Supp. 3d at 174–76 (similar).

20 **iii. The Policy Amounts to an Arbitrary and Capricious**
 21 **Interpretation of the INA**

22 Even if the Court were to conclude that the INA’s text is ambiguous as to
 23 whether turnbacks could be permissible in some form and even if, contrary to the
 24 evidence, Defendants adopted the turnback policy for a legitimate reason, the fact
 25 that the policy turns asylum seekers back to danger *en masse* nevertheless amounts
 26 to an arbitrary and capricious interpretation of § 1225 because it is “inconsistent with
 27 clearly expressed congressional intent,” *EBSC v. Trump*, 950 F.3d 1242, 1273 (9th
 28 Cir. 2020).

1 The turnback policy has resulted in a humanitarian crisis across the border in
 2 contravention of the INA and the humanitarian principles Congress sought to
 3 enshrine in it. *See* Ex. 51 at 746. Under the policy, Defendants have forced thousands
 4 of asylum seekers to wait in dangerous border towns where they risk physical harm
 5 or death. *See, e.g.,* Ex. 96 at 009; Ex. 100 at 202:24-203:5; Ex. 51 at 746. And
 6 Defendants are well aware of the dangers asylum seekers face in Mexico. *See, e.g.,*
 7 Ex. 14 at 97:4-99:5 (CBP is aware of S [REDACTED]
 8 [REDACTED]
 9 [REDACTED]). But in enacting § 1225, Congress adopted inspection and processing
 10 requirements that ensure that despite CBP's general ability to perform summary
 11 expedited removal, those with claims for humanitarian protection have the ability to
 12 seek asylum *before* they are summarily sent back to Mexico. *See* H.R. Conf. Rep.
 13 No. 104-828, at 209 (1996) (noting the purposes of § 1225 are to “expedite the
 14 removal from the [U.S.] of aliens who indisputably have no authorization to be
 15 admitted” while concurrently providing individuals in that category who claim
 16 asylum to have that claim “promptly assessed”). Thus, Congress intended processing
 17 of asylum seekers—and only asylum seekers—instead of expedited removal, to
 18 avert the harm such individuals might face if summarily removed. The human toll
 19 of the turnback policy evinces an abject failure to consider Congress's guiding
 20 concern in crafting the relevant portions of § 1225—preventing just such harm.
 21 Thus, in the context of the current dangers asylum seekers face in Mexico, the
 22 turnback policy is “inconsistent with clearly expressed congressional intent,” *EBSC*
 23 *v. Trump*, 950 F.3d at 1273.

24 **B. The Turnback Policy Violates the Due Process Clause**

25 As this Court has already held and as Defendants concede, Plaintiffs have
 26 Fifth Amendment due process rights that are coextensive with their statutory rights
 27 under the INA. Dkt. 280 at 70, 76; *see also Meachum v. Fano*, 427 U.S. 215, 226
 28 (1976) (minimum due process rights attach to statutory rights); *Graham v. FEMA*,

1 149 F.3d 997, 1001 & n.2 (9th Cir. 1998). “In the enforcement of [congressional
 2 immigration] policies, the Executive Branch of the Government must respect the
 3 procedural safeguards of due process.” *Kleindienst v. Mandel*, 408 U.S. 753, 767
 4 (1972) (quotation omitted). Congress “has plainly established procedural protections
 5 for” class members, requiring that they “shall” be inspected and processed for
 6 asylum at POEs pursuant to § 1225 of the INA. Dkt. 280 at 76-77; *cf. Perales v.*
 7 *Reno*, 48 F.3d 1305, 1314 (2d Cir. 1995) (Congress’s use of word “shall” in IRCA
 8 gives rise to statutory entitlements which are subject to due process protections).
 9 This is so even if the Court concludes that Plaintiffs have not met all the technical
 10 requirements necessary to succeed on their APA claims. Dkt. 280 at 67 n.13, 68.
 11 Accordingly, Plaintiffs have proven a due process violation on this basis alone.

12 In addition, the government’s policy to categorically deny class members their
 13 statutorily mandated entitlement to the asylum scheme also constitutes a violation of
 14 fundamental due process principles. At its core, due process is a “protection of the
 15 individual against arbitrary action of government,” *County of Sacramento v. Lewis*,
 16 523 U.S. 833, 845 (1998), and its procedural component protects against “denial of
 17 fundamental procedural fairness.” *Id.* at 845-46. In applying procedural due process,
 18 courts are to prevent an “arbitrary deprivation” of rights “without threatening
 19 institutional interests or imposing undue administrative burdens.” *Superintendent v.*
 20 *Hill*, 472 U.S. 445, 455 (1985). Due process is “flexible and depend[s] on a balancing
 21 of the interests affected by the relevant government action.” *Id.* at 454.

22 The undisputed facts show that the turnback policy violates this due process
 23 requirement. The weight of the procedural right at stake here is enormous: Plaintiffs’
 24 statutorily-enshrined right to seek protection from persecution for themselves and
 25 their families. *See Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970) (potential for
 26 grave consequences necessitates maximum procedural due process protections); Ex.
 27 20 at ¶ 86 (“[T]here are . . . cases of turn-backs and metering that have led to an
 28 effective end to asylum seekers’ claims, and even their lives.”); *cf. Marincas v.*

Lewis, 92 F.3d 195, 203 (3d Cir. 1996) (“The basic procedural rights Congress intended to provide asylum applicants . . . are particularly important because an applicant erroneously denied asylum could be subject to death or persecution if forced to return to his or her home country.”). Further, it is self-evident that in a system of separation of powers, the executive branch is not free to ignore statutorily mandated procedures by claiming that they impose a “burden.” Defendants need only return to inspecting and processing asylum seekers in accordance with the statutorily required procedure, as Defendants were doing before the turnback policy. Where individual interest in the mandatory, life-saving protections of a statute is so grave, and the government’s actual—as opposed to manufactured and pretextual (*see supra* at 26-29)—burden to abide by the statute is negligible, Defendants’ willful and arbitrary decision to deny individuals access to those statutory protections violates fundamental due process principles.

C. The Turnback Policy Violates the ATS

As this Court recognized, the ATS allows noncitizens to seek redress for a “violation of the law of nations,” 28 U.S.C. § 1350, that is “specific, universal, and obligatory.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quotation omitted); Dkt. 280 at 80. The duty of *non-refoulement* has achieved the status of a *jus cogens* norm—*i.e.* “an elite subset of . . . customary international law” from which no derogation is ever permitted. *Siderman de Blake v. Rep. of Arg.*, 965 F.2d 699, 714-15 (9th Cir. 1992). Plaintiffs have previously summarized the international law authorities recognizing *non-refoulement* as a *jus cogens* norm, *see* Dkt. 210 at 27-30, a point which Defendants “concede[d].” Dkt. 280, at 82. That should be sufficient to meet the *Sosa* standard and authorize jurisdiction under the ATS. *Id.*

The duty of *non-refoulement* forbids a government from returning or expelling an individual to a country where he or she has a well-founded fear of persecution, torture, or other harm, whether it is the individual’s home country or another country, *see I.N.S. v. Stevic*, 467 U.S. 407, 417 & n.20 (1984) (referencing

obligations under 1951 Refugee Convention), and it “encompass[es] any measure . . . which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened[.]” U.N. High Comm’r for Refugees, *Note on International Protection*, ¶ 16 (citing Refugee Convention, art. 33(1)). As interpreted by the European Court of Human Rights, the principle of *non-refoulement* “essentially means that States must refrain from returning a person (directly or indirectly) to a place where he or she could face a real risk of being subjected to torture or to inhuman[e] or degrading treatment.”¹⁹

The Turnback Policy violates the duty of *non-refoulement*—and thus the ATS—on multiple grounds. First, Defendants have *refouled* class members to Mexico where they fear persecution or other harm, and Defendants “knew or should have known” of those likely risks. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09 ¶¶ 131, 156 (Eur. Ct. H.R., Feb. 23, 2012). Three of the Plaintiffs—Abigail, Beatrice, and Carolina—are Mexican nationals who claimed fear of persecution in Mexico—the country to which they were *refouled*. See Dkt. 390-11 at ¶¶ 18-20; 390-12 at ¶¶ 26-27; 390-13 at ¶¶ 28-31. Many other class members stated a substantial fear of harm in Mexico. See, e.g., Dkts. 390-11, 390-12, 390-13, 390-14, 390-15, 390-16, 390-73, 390-74, 390-75, 390-76, 390-77, 390-78, 390-79, 390-80, 390-81, 390-82, 390-83, 390-85.

Further, Defendants knew that class members were at risk of such harms in Mexico. Other Executive agencies had stated the risks publicly. Many border towns are so dangerous the Department of State prohibits U.S. government employees from traveling there, of which this Court may take judicial notice. Dkt. 216 at 10, n.32; see also Ex. 14 at 97:4-99:5 (CBP is aware of State Department’s travel advisories

¹⁹ *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09 ¶ 34 (Eur. Ct. H.R., Feb. 23, 2012), available at shorturl.at/nEHNO. Numerous courts are in accord. See, e.g., *Ilias v. Hungary*, App. No. 47287/15 ¶ 98, 244 (Eur. Ct. H.R. Mar. 14, 2017) available at shorturl.at/aizK2; *M.S.S. v. Belgium and Greece*, App. No. 30696/09 ¶ (Eur. Ct. H.R., Jan. 21, 2011) available at shorturl.at/yKWY7; *Abdolkhani & Karimnia v. Turkey*, App. No. 30471/08, ¶ 88 (Eur. Ct. H.R., Sep. 22, 2009), available at shorturl.at/dyTU8.

for Mexican border states). Plaintiffs also have presented undisputed evidence that non-Mexican asylum seekers are at particular risk of harm in Mexico after CBP *refoulement*. Although these class members do not claim persecution from Mexico, this showing is not required under *non-refoulement* doctrine if Plaintiffs otherwise show that their “life or freedom would be threatened,” UNHCR, *Note on International Protection*, ¶ 16, or that they have a substantial fear of “inhuman[e] treatment.” *See supra* note 18. Migrants marooned on the Mexican side of the border await a full panoply of dangers, including “disappearances, kidnappings, rape[,] sexual and labor exploitation,” and worse. Dkt. 104-C at 16; *see Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1078 (9th Cir. 2020) (discussing danger). It has been described as a “human rights catastrophe,” Dkt. 293-34 at 1, and overwhelming evidence corroborates the existence of these threats. *See, e.g.*, Ex. 20 at ¶¶ 83-86. Defendants are or should be fully aware of the peril the turnback policy places on its targets, and have thus violated their duty of *non-refoulement* by implementing it. *See, e.g.*, Ex. 100 at 201:1-203:5.

Finally, the Turnback Policy subjects asylum-seekers to impermissible chain *refoulement*—that is, the risk that CBP’s expulsion of migrants to Mexico will lead to Mexican-initiated deportation.²⁰ Mexico—whose asylum system has been described as on “the brink of collapse”²¹—has continually violated migrants’ rights. To wit, when CBP turned back Plaintiff Roberto Doe in October 2018, it specifically instructed Mexican immigration officials to remove him from the bridge, and Roberto was later deported from Mexico. Dkt. 390-75 at ¶ 4, 9, 390-97 at ¶¶ 6-7. Plaintiff Cesar Doe would have suffered the same fate were it not for the timely intervention of an attorney who thwarted his deportation twelve days into his

²⁰ *See, e.g., Hirsi Jamaa and Others v. Italy*, App. No. 27765/09 (Eur. Ct. H.R., Feb. 23, 2012) (Italy violated *non-refoulement* when it refused to consider whether Libya would onwardly deport asylum seekers); *T.I. v. United Kingdom*, App. No. 43844/98, ¶ 2 (Eur. Ct. H.R., Mar. 7, 2000) available at shorturl.at/iHK68 (same).

²¹ Elyssa Pachico and Maureen Meyer, *One Year After U.S.-Mexico Migration Deal, a Widespread Humanitarian Disaster*, WOLA (Jun. 6, 2020).

1 Mexican-ordered detention. Dkt. 390-101 at ¶¶ 8-9. CBP’s cooperation with
 2 Mexican immigration authorities jeopardizes hundreds—if not thousands—of
 3 individuals’ legitimate claims to asylum through the *chain refoulement* process. *See*,
 4 *e.g.*, Dkt. 293-47 at ¶¶ 11-16; 293-46 at ¶¶ 39-46.

5 **C. The Court Should Enter A Permanent Injunction**

6 The relief Plaintiffs seek is simple: for Defendants to cease treating asylum
 7 seekers differently from all other people arriving at POEs on foot or by vehicle. Prior
 8 to instituting the Turnback Policy, the government inspected those seeking access to
 9 the asylum process just like everybody else; that is, in the order in which they
 10 approached the POE. Defendants’ self-generated “operational capacity” constraints
 11 have created an unlawful and untenable situation at the U.S.-Mexico border and
 12 absent injunctive relief, Defendants’ “past and present misconduct indicates a strong
 13 likelihood of future violations.” *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549,
 14 564 (9th Cir. 1990). “The Supreme Court has repeatedly upheld the appropriateness
 15 of federal injunctive relief to combat [such] a ‘pattern’ of illicit law enforcement
 16 behavior.” *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985).

17 Because they have succeeded on the merits of their claims, *see supra* 20-37,
 18 Plaintiffs’ ability to satisfy the remaining factors warranting permanent injunctive
 19 relief is uncontroversial. “A permanent injunction is appropriate when: (1) a plaintiff
 20 will suffer an irreparable injury absent injunction, (2) remedies available at law are
 21 inadequate, (3) the balance of hardships between the parties supports an equitable
 22 remedy, and (4) the public interest would not be disserved.” *Sierra Club v. Trump*,
 23 963 F.3d 874, 895 (9th Cir. 2020) (citing *eBay Inc. v. MercExchange LLC*, 547 U.S.
 24 388, 391 (2006)).

25 **First**, as discussed *supra* 16-18, the statutory, constitutional, and international
 26 law violations Defendants commit through implementation of the turnback policy
 27 put asylum seekers in grave danger in Mexico and deny them access to the U.S.
 28

1 asylum process. These violations constitute irreparable harm. *See E. Bay Sanctuary*
 2 *Covenant v. Trump*, 349 F. Supp. 3d 838, 864 (N.D. Cal. 2018) (loss of the right to
 3 seek asylum constitutes irreparable harm); *Hernandez v. Sessions*, 872 F.3d 976, 994
 4 (9th Cir. 2017) (“the deprivation of constitutional rights ‘unquestionably constitutes
 5 irreparable injury’”) (citation omitted). Moreover, the “ongoing harms to [Plaintiff
 6 Al Otro Lado’s] organizational missions” also constitute irreparable harm. *E. Bay*
 7 *Sanctuary Covenant v. Barr*, 964 F.3d at 854 (citation omitted).

8 **Second**, injunctive relief is appropriate because the turnback policy strands
 9 class members in border towns where they face grave harm while waiting
 10 indefinitely to seek asylum in the U.S., *see supra* 16-18, and there “are no legal
 11 remedies available that would adequately compensate the class members” for this
 12 type of harm. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998) (there is “no
 13 way to calculate the value of such a constitutional deprivation or the damages that
 14 result from erroneous deportation”) (citation omitted). Moreover, where, as here, a
 15 court has certified a class action under Rule 23(b)(2), Dkt. 513 at 18, the Rule
 16 “literally permits only class applications for injunctive or declaratory relief.”
 17 *LaDuke*, 762 F.2d at 1330.

18 **Third** and **Fourth**, the balance of the hardships and the public interest weigh
 19 in Plaintiffs’ favor. “When the government is a party to the case, the court should
 20 consider the balance of hardships and public interest factors together.” *Sierra Club*,
 21 963 F.3d at 895 (citation omitted). Even if Defendants suffer some hardship by
 22 processing more asylum seekers, that harm is far outweighed by denying class
 23 members access to the U.S. asylum process. On the one hand, processing and
 24 inspecting asylum seekers is *CBP’s job*. Asking an agency to do its job is not a
 25 hardship. Defendants inspected asylum seekers as they approached a POE without
 26 resorting to turnbacks before 2016, *see* Ex. 3 at 71:9-16, and continue to do so for
 27 individuals who approach a POE with travel documents and for vehicular traffic, Ex.
 28 118 at 24:17-25:13. There is no reason why CBP cannot return to inspecting and

1 processing even high numbers of asylum seekers. Ex. 3 at 71:9-16. On the other
 2 hand, any hardships the government faces pale in comparison to the denial of
 3 statutory rights and the grave risk of persecution, torture, and death that class
 4 members will face absent an injunction. *See supra* at 16-18.

5 Complying with an injunction should not be difficult. Defendants have [REDACTED]
 6 [REDACTED] Ex. 120 at
 7 270 (“[REDACTED]
 8 [REDACTED]”). Moreover, the Supreme Court has recognized that
 9 “preventing aliens from being wrongfully removed, particularly to countries where
 10 they are likely to face substantial harm,” is “of course” in the public interest. *Nken*
 11 *v. Holder*, 556 U.S. 418, 436 (2009); *see also League of Women Voters of U.S. v.*
 12 *Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (“There is generally no public interest in the
 13 perpetuation of unlawful agency action.”). Turning back Mexican class members to
 14 their country of origin and stranding non-Mexican class members in Mexico
 15 constitutes an unlawful denial of access to the U.S. asylum process. Defendants have
 16 sought to do through policy what they cannot do by law: deny those in need of
 17 protection access to the U.S. asylum process. Therefore, the Court should enter an
 18 injunction that permanently enjoins all forms of turnbacks and requires Defendants
 19 to inspect and process asylum seekers as they arrive at Class A POEs on the U.S.-
 20 Mexico border.

21 **E. The Court Should Enter A Declaratory Judgment**

22 In addition to a injunctive relief, the Court should also enter a declaratory
 23 judgment that Defendants have violated the APA, Fifth Amendment, and ATS.
 24 “[A]ny court of the United States . . . may declare the rights and other legal relations
 25 of any interested party seeking such declaration, whether or not further relief is or
 26 could be sought.” 28 U.S.C. § 2201(a); *see also McGraw-Edison Co.*, 362 F.2d at
 27 342 (declaratory relief is appropriate in addition to other forms of relief). Here,
 28 Plaintiffs seek a declaratory judgment that “will serve a useful purpose in clarifying

the legal relations at issue,” *GEICO v. Dizol*, 133 F.3d 1220, 1225 n.5 (9th Cir. 1998), namely adjudicating whether the turnback policy broke the law. Because Plaintiffs have shown via undisputed facts that Defendants’ conduct was unlawful, this Court should enter a declaratory judgment that Defendants violated the APA, Fifth Amendment, and ATS. *See California v. Trump*, 963 F.3d 926, 949 (9th Cir. 2020) (affirming summary judgment entering a declaratory judgment where the undisputed facts showed that the Government broke the law).

V. CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to summary judgment, declaratory relief, and a permanent injunction.

Dated: September 4, 2020

MAYER BROWN LLP
Matthew H. Marmolejo
Ori Lev
Stephen M. Medlock

SOUTHERN POVERTY LAW
CENTER
Melissa Crow
Sarah Rich
Rebecca Cassler

CENTER FOR CONSTITUTIONAL
RIGHTS
Baher Azmy
Ghita Schwarz
Angelo Guisado

AMERICAN IMMIGRATION
COUNCIL
Karolina Walters

By: /s/ Stephen M. Medlock
Stephen M. Medlock

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all counsel via the Court's CM/ECF system.

Dated: September 4, 2020

MAYER BROWN LLP

By /s/ Stephen M. Medlock

MEMO OF P. & A. IN SUPP. OF
PLTFS' MOT. S.J.

MAYER BROWN LLP
Matthew H. Marmolejo (CA Bar No. 242964)
mmarmolejo@mayerbrown.com
350 S. Grand Avenue
25th Floor
Los Angeles, CA 90071-1503
Ori Lev (DC Bar No. 452565)
(*pro hac vice*)
olev@mayerbrown.com
Stephen M. Medlock (VA Bar No. 78819)
(*pro hac vice*)
smedlock@mayerbrown.com
1999 K Street, N.W.
Washington, D.C. 20006
Telephone: +1.202.263.3000
Facsimile: +1.202.263.3300

SOUTHERN POVERTY LAW CENTER
Melissa Crow (DC Bar No. 453487)
(*pro hac vice*)
melissa.crow@splcenter.org
1101 17th Street, N.W., Suite 705
Washington, D.C. 20036
Telephone: +1.202.355.4471
Facsimile: +1.404.221.5857

Additional counsel listed on next page
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Al Otro Lado, Inc., *et al.*,

Plaintiffs,

v.

Chad F. Wolf,¹ *et al.*,

Defendants.

Case No.: 17-cv-02366-BAS-KSC

**EXHIBIT 20 IN SUPPORT OF
PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT**

FILED UNDER SEAL

¹ Acting Secretary Wolf is automatically substituted for former Acting Secretary McAleenan pursuant to Fed. R. Civ. P. 25(d).

1 CENTER FOR CONSTITUTIONAL RIGHTS

2 Baher Azmy (NY Bar No. 2860740) (*pro hac vice*)

3 *bazmy@ccrjustice.org*

4 Ghita Schwarz (NY Bar No. 3030087) (*pro hac vice*)

5 *gschwarz@ccrjustice.org*

6 Angelo Guisado (NY Bar No. 5182688) (*pro hac vice*)

7 *aguisado@ccrjustice.org*

8 666 Broadway, 7th Floor

9 New York, NY 10012

10 Telephone: +1.212.614.6464

11 Facsimile: +1.212.614.6499

12 SOUTHERN POVERTY LAW CENTER

13 Sarah Rich (GA Bar No. 281985) (*pro hac vice*)

14 *sarah.rich@splcenter.org*

15 Rebecca Cassler (MN Bar No. 0398309) (*pro hac vice*)

16 *rebecca.cassler@splcenter.org*

17 150 E. Ponce de Leon Ave., Suite 340

18 Decatur, GA 30030

19 Telephone: +1.404.521.6700

20 Facsimile: +1.404.221.5857

21 AMERICAN IMMIGRATION COUNCIL

22 Karolina Walters (DC Bar No. 1049113) (*pro hac vice*)

23 *kwalters@immcouncil.org*

24 1331 G St. NW, Suite 200

25 Washington, D.C. 20005

26 Telephone: +1.202.507.7523

27 Facsimile: +1.202.742.5619

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

**UNITED STATES DISTRICT COURT
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Case No.: 17-cv-02366-BAS-KSC

EXPERT REPORT OF STEPHANIE LEUTERT



HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

I. Introduction and Qualifications

1. My name is Stephanie Leutert. I am the Director of the Central America & Mexico Policy Initiative (“CAMPI”) at the Strauss Center for International Security and Law at the University of Texas. In this role, I lead the development and programming for CAMPI and conduct original research on the U.S.-Mexico border and Central American migration.

2. I previously submitted declarations in connection with the Plaintiffs’ September 26, 2019 motions for provisional class certification and preliminary injunction.¹

3. I am an expert on the practices of U.S. Customs and Border Protection (“CBP”) officers and supervisors with respect to arriving asylum seekers at ports of entry (“POEs”) on the U.S.-Mexico border from 2016 to the present. I am the lead author of the first-ever border-wide report on the U.S. Customs and Border Protection’s (“CBP’s”) metering policy and the related asylum waitlists in Mexican border cities.

4. I have also led the publication of four subsequent metering updates that document CBP’s practices and the conditions faced by asylum seekers waiting in Mexican border cities.

¹ ECF Nos. 293-8, 294-5.

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5. In addition to this work, I teach a graduate level course on Mexico’s migration policy at the Lyndon B. Johnson School of Public Affairs at the University of Texas.

6. Through my work at CAMPI, I have directly observed CBP’s implementation of its turn-back policy at ports of entry (“POEs”) on the U.S.-Mexico border. Since October 2018, I have personally conducted fieldwork in eight Mexican border cities² where asylum seekers affected by CBP’s metering policy are forced to wait. In these cities, I have spoken directly with affected asylum seekers, along with migrant shelter staff, members of civil society organizations, and Mexican federal and local government officials. I have interviewed affected asylum seekers who were waiting on international bridges, affected asylum seekers who were sleeping in encampments near the international bridges, and affected asylum seekers waiting in migrant shelters. I have watched firsthand as asylum seekers arrived at the United States - Mexico international line and were turned back by CBP officers. I have seen copies of asylum waitlists in six Mexican border cities³ and

² Those cities are Matamoros, Tamaulipas; Nuevo Progreso, Tamaulipas; Reynosa, Tamaulipas; Ciudad Miguel Alemán, Tamaulipas; Nuevo Laredo, Tamaulipas; Piedras Negras, Coahuila; Ciudad Acuña, Coahuila; Nogales, Sonora.

³ Those cities are Matamoros, Tamaulipas; Nuevo Progreso, Tamaulipas; Reynosa, Tamaulipas; Piedras Negras, Coahuila; Ciudad Acuña, Coahuila; Ciudad Juárez, Chihuahua.

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have spoken to eight individuals in charge of running these lists.⁴ I have also partnered with colleagues who conducted similar fieldwork in five additional Mexican border cities.⁵

7. A copy of my current curriculum vitae, which includes a list of all publications that I have authored in the prior 10 years, is attached as **Exhibit A** to this report.

8. My typical consulting rate is \$300 an hour. I have elected to waive that fee in this case and will receive no compensation for my work in this litigation.

9. I understand from Plaintiffs’ counsel that I have been retained to offer opinions on issues related to class certification in this litigation. This report contains a complete statement of all of my opinions related to class certification and reasons for them. It also contains all of the exhibits that will be used to summarize or support those opinions. I understand that some depositions and document productions will occur after my report is submitted. I reserve the right to amend and revise this report and the exhibits to it if I should be made aware of information relevant to my

⁴ These list managers were in the cities of Matamoros, Tamaulipas; Nuevo Progreso, Tamaulipas; Reynosa, Tamaulipas; Ciudad Miguel Alemán, Tamaulipas; Nuevo Laredo, Tamaulipas; Piedras Negras, Coahuila; and Ciudad Acuña, Coahuila (two list managers: individuals and families).

⁵ Those cities are Ciudad Juárez, Chihuahua; Agua Prieta, Sonora; San Luís Rio Colorado, Sonora; Mexicali, Baja California; and Tijuana, Baja California.

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opinions.⁶

II. Materials Considered

10. I considered the following facts and data when forming the opinions expressed in this report.

11. Since December 2018, CAMPI has published regular reports on CBP’s metering practices and the conditions for asylum seekers in Mexican border cities (the “Reports”). These reports include: (a) *Asylum Processing and Waitlists at the U.S.-Mexico Border* (December 2018), (b) *Metering Update* (February 2019), (c) *Metering Update* (May 2019), (d) *Metering Update* (August 2019), (e) *Metering Update* (November 2019).

12. The Reports are based on information that I, other members of CAMPI, and colleagues from the University of California San Diego and the Migration Policy Centre, have collected directly from field and phone interviews and direct observation on visits to Mexican border cities. These Reports are cited throughout this report.

13. This expert report also references documents produced by the defendants in this litigation during discovery.⁷ I considered over 1,500 documents

⁶ This is the only case in which I have testified in the previous four years as an expert at trial or by deposition.

⁷ I understand from plaintiffs’ counsel that the current defendants in this litigation

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individuals arriving at the San Ysidro and Otay Mesa ports of entry began to report being turned back to Mexico. At the Ped-West crossing—a pedestrian crossing for northbound travelers in the San Ysidro port of entry—asylum seekers were told that they had to speak with Mexican immigration officials before their asylum claims could be processed in the United States.³² In July 2016, the American Immigration Council documented the case of a Mexican man being returned to Tijuana, and the following month another three teenage Guatemalans and a 21 year old Guatemalan man were also turned back.³³

41. The San Diego metering system soon spread across the border. It first spread to nearby cities, such as Calexico (in the San Diego sector) and Nogales (in the Tucson sector), where metering systems were put in place after the arrival of a large number of Haitian asylum seekers in a short period of time. In September 2016, large numbers of Haitians arrived in Mexicali (across the border from Calexico) and Grupo Beta, the humanitarian agency inside Mexico’s National Migration Institute, began organizing a list for the waiting Haitians as well as providing them with dates

³² “Re: U.S. Customs and Border Protection’s Systemic Denial of Entry to Asylum Seekers at Ports of Entry on U.S.-Mexico Border, American Immigration Council, January 13, 2017, https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/cbp_systemic_denial_of_entry_to_asylum_seekers_advocacy_document.pdf.

³³ Ibid.

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for when they should show up at the U.S. port of entry.³⁴ By October 19, 2016, a line of Haitian asylum seekers was also waiting at the Nogales port of entry. In Nogales, Sonora (across the border from Nogales, Arizona), the municipal government created a waitlist for the asylum seekers.³⁵ Yet, by December 2016 the list had dissolved, as CBP officers processed the waiting Haitians in the city and stopped metering.

42. Around the same time, metering also expanded to the other end of the border. It first spread to the Laredo sector, which was experiencing an increase in the number of Cubans arriving to Nuevo Laredo in the final months of 2016.³⁶ On November 12, 2016, the Assistant Director of Field Operations for the Laredo Field Office wrote an email to all Laredo sector port directors,³⁷ asking them to meet with

³⁴ “Asylum Processing and Waitlists at the U.S.-Mexico Border,” Strauss Center for International Security and Law, Center for U.S.-Mexican Studies, & Migration Policy Centre, December 2018, https://www.strausscenter.org/images/strauss/18-19/MSI/AsylumReport_190308.pdf; “Mexicans Respond To Haitians, Africans With Unusual Hospitality,” September 22, 2016, https://www.youtube.com/watch?v=UzaCrd8R_LA.

³⁵ Curt Prendergast, “Haitians hoping for US asylum gather at Nogales border crossing,” *Arizona Daily Star*, October 26, 2016 https://tucson.com/news/local/border/haitians-hoping-for-us-asylum-gather-at-nogales-border-crossing/article_7c401363-f48e-540b-9cf8-4390b1ce7b55.html.

³⁶ “Southwest Border Inadmissibles by Field Office FY2017,” U.S. Customs and Border Protection, accessed December 6, 2019, <https://www.cbp.gov/newsroom/stats/ofo-sw-border-inadmissibles-fy2017>.

³⁷ This includes port directors in Brownsville, Del Rio, Eagle Pass, Hidalgo, Laredo,

MAYER BROWN LLP
Matthew H. Marmolejo (CA Bar No. 242964)
mmarmolejo@mayerbrown.com
350 S. Grand Avenue
25th Floor
Los Angeles, CA 90071-1503
Ori Lev (DC Bar No. 452565)
(*pro hac vice*)
olev@mayerbrown.com
Stephen M. Medlock (VA Bar No. 78819)
(*pro hac vice*)
smedlock@mayerbrown.com
1999 K Street, N.W.
Washington, D.C. 20006
Telephone: +1.202.263.3000
Facsimile: +1.202.263.3300

SOUTHERN POVERTY LAW CENTER
Melissa Crow (DC Bar No. 453487)
(*pro hac vice*)
melissa.crow@splcenter.org
1101 17th Street, N.W., Suite 705
Washington, D.C. 20036
Telephone: +1.202.355.4471
Facsimile: +1.404.221.5857

Additional counsel listed on next page
Attorneys for Plaintiffs

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Chad F. Wolf,¹ *et al.*,

Defendants.

Case No.: 17-cv-02366-BAS-KSC

**EXHIBIT 34 IN SUPPORT OF
PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT**

¹ Acting Secretary Wolf is automatically substituted for former Acting Secretary McAleenan pursuant to Fed. R. Civ. P. 25(d).

1 CENTER FOR CONSTITUTIONAL RIGHTS

2 Baher Azmy (NY Bar No. 2860740) (*pro hac vice*)

3 *bazmy@ccrjustice.org*

4 Ghita Schwarz (NY Bar No. 3030087) (*pro hac vice*)

5 *gschwarz@ccrjustice.org*

6 Angelo Guisado (NY Bar No. 5182688) (*pro hac vice*)

7 *aguisado@ccrjustice.org*

8 666 Broadway, 7th Floor

9 New York, NY 10012

10 Telephone: +1.212.614.6464

11 Facsimile: +1.212.614.6499

12 SOUTHERN POVERTY LAW CENTER

13 Sarah Rich (GA Bar No. 281985) (*pro hac vice*)

14 *sarah.rich@splcenter.org*

15 Rebecca Cassler (MN Bar No. 0398309) (*pro hac vice*)

16 *rebecca.cassler@splcenter.org*

17 150 E. Ponce de Leon Ave., Suite 340

18 Decatur, GA 30030

19 Telephone: +1.404.521.6700

20 Facsimile: +1.404.221.5857

21 AMERICAN IMMIGRATION COUNCIL

22 Karolina Walters (DC Bar No. 1049113) (*pro hac vice*)

23 *kwalters@immcouncil.org*

24 1331 G St. NW, Suite 200

25 Washington, D.C. 20005

26 Telephone: +1.202.507.7523

27 Facsimile: +1.202.742.5619

From: Owen, Todd C (AC OFO)
Sent: Wednesday, May 25, 2016 10:19 PM
To: MARTEL, CARLOS C; WAGNER, JOHN P; HOFFMAN, TODD A; HUNOLT, KIRBY
Cc: BRAUNSTEIN, MARGARET A; BORDEAUX, TYESHA; DODD, BRUCE E
Subject: RE: Credible Fear Influx Spot Report

Kirby, pls advise the status of the cap waiver request for San Diego. Need to know by 11am Thursday. In speaking with Pete Flores, we need to get this approved immediately. Pls advise.

Thx.

Todd C. Owen
Executive Assistant Commissioner
Office of Field Operations
U.S. Customs & Border Protection

From: MARTEL, CARLOS C
Sent: Wednesday, May 25, 2016 6:20:03 PM
To: Owen, Todd C (AC OFO); WAGNER, JOHN P; HOFFMAN, TODD A
Cc: BRAUNSTEIN, MARGARET A
Subject: FW: Credible Fear Influx Spot Report

Gentlemen: FYSA - Significant increase in CF cases at SYS/Otay POEs resulting in saturation of temp detention space. Mitigation actions are enumerated below to include virtual processing assistance from Detroit and MIA. Media coverage is expected.

Carlos C. Martel
Acting Executive Director, Operations
Office of Field Operations
U. S. Customs and Border Protection

Office
Mobile

From: ARMILLO, JOHNNY L
Sent: Thursday, May 26, 2016 1:59:31 AM
To: MARTEL, CARLOS C; BRAUNSTEIN, MARGARET A
Cc: OFO-FIELD LIAISON; FLORES, PETE ROMERO; BRINTON, WALTER A; HENNING, PAUL R; AKI, SIDNEY K; HOOD, ROBERT W; CARRILLO, SALLY R; MISENHELTER, JOSEPH; CASTILLO, MOISES; MARIN, MARIZA; TAITAGUE, CLAUDIA; GRANADOS, ANDREA M; COOK, VERNON; TIBBETTS, STEVEN L
Subject: Credible Fear Influx Spot Report

Greetings, Sir. The SDFO has received multiple media requests regarding the Credible Fear/Asylum activity at the San Ysidro Port of Entry. The inquiries are most likely attributed to our usage of a designated queuing area (Asylum line) in

pedestrian that we utilize due to the infrastructure constraints that currently exist within our Admissibility Enforcement Unit.

Credible Fear Influx

- The number of Credible Fear encounters at the San Ysidro/Otay Mesa Ports of Entry remain elevated.
- This morning's San Ysidro/Otay Mesa Admissibility Enforcement Unit (AEU) activity report indicated a total 885 individuals in various stages of immigration removal proceedings. Many of them asserting Credible Fear/Asylum.
- Additionally, Public Affair Officers/Liaisons have received multiple media inquiries regarding an influx of Haitians.
- A Borderstat query indicates 422 Haitians have presented themselves and asserted Credible Fear during the month of May 2016 (May 1-25).
- The San Ysidro/Otay Mesa AEU has exceeded its existing temporary detention capabilities and have undertaken the following remedies to create additional space.
 - 1) Utilized several Border Patrol Stations to temporarily hold detainees awaiting transfer to ICE-ERO.
 - 2) Transferred all accompanied and unaccompanied unit processing to the Old Port overflow processing area.
 - 3) Transferred all permit (I-94) processing to the Otay Mesa Port of Entry in order to secure additional workstations to conduct in person or virtual interviews.
 - 4) Converted GSA's recently vacated maintenance working area at the Old Port into a temporary holding room.
- Port management is currently working with San Diego Sector Border Patrol to utilize the Imperial Beach station to hold and process single adult males awaiting Credible Fear.

Johnny Armijo
Assistant Director Border Security
San Diego, California



MAYER BROWN LLP
Matthew H. Marmolejo (CA Bar No. 242964)
mmarmolejo@mayerbrown.com
350 S. Grand Avenue
25th Floor
Los Angeles, CA 90071-1503
Ori Lev (DC Bar No. 452565)
(*pro hac vice*)
olev@mayerbrown.com
Stephen M. Medlock (VA Bar No. 78819)
(*pro hac vice*)
smedlock@mayerbrown.com
1999 K Street, N.W.
Washington, D.C. 20006
Telephone: +1.202.263.3000
Facsimile: +1.202.263.3300

SOUTHERN POVERTY LAW CENTER
Melissa Crow (DC Bar No. 453487)
(*pro hac vice*)
melissa.crow@splcenter.org
1101 17th Street, N.W., Suite 705
Washington, D.C. 20036
Telephone: +1.202.355.4471
Facsimile: +1.404.221.5857

Additional counsel listed on next page
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Al Otro Lado, Inc., *et al.*,

Plaintiffs,

v.

Chad F. Wolf,¹ *et al.*,

Defendants.

Case No.: 17-cv-02366-BAS-KSC

**EXHIBIT 35 IN SUPPORT OF
PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT**

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7 *aguisado@ccrjustice.org*

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9 New York, NY 10012

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16 *rebecca.cassler@splcenter.org*

17 150 E. Ponce de Leon Ave., Suite 340

18 Decatur, GA 30030

19 Telephone: +1.404.521.6700

20 Facsimile: +1.404.221.5857

21 AMERICAN IMMIGRATION COUNCIL

22 Karolina Walters (DC Bar No. 1049113) (*pro hac vice*)

23 *kwalters@immcouncil.org*

24 1331 G St. NW, Suite 200

25 Washington, D.C. 20005

26 Telephone: +1.202.507.7523

27 Facsimile: +1.202.742.5619

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From: HOOD, ROBERT W
Sent: Thursday, May 26, 2016 5:38 PM
To: AKI, SIDNEY K
CC: CASTILLO, MOISES; MARIN, MARIZA
Subject: Actions Taken for Influx of Haitians

Importance: High

Sir, for your information below are the actions we have since May 15, 2016 taken regarding the current Haitian influx.

Actions Taken to Mitigate Mass Migration at San Ysidro

- Activation of SYS AEU Max Capacity Contingency Plan
- Priority cases being processed – 1) UAC's, 2) Medical issues, 3) Families and 4) Haitians (NTA-Released) May 16
- All three shifts have been up staffed from 20 officers to 38 officers per shift. (Note: not all officers assigned as additional staffing from passenger can process cases. Some are assigned to Intake, Detention Control, transportation and file preparation).
- Request, coordination and activation of Virtual Processing with local SDFO Ports (Cargo, APSP, Tecate, CLX, Andrade and JTF-W OFO team depending on staffing and availability – schedule is being worked on).
- Activation of El Centro OBP Virtual Processing through JTF-W Imperial Valley (generally 1 – 2 agents per shift).
- Dedication of a separate expedited intake of families into the Old Port 2nd floor with full intake and processing.
- Coordination with OBP to house completed single ER/CF cases. Brownfield will house a capacity of [REDACTED] and Imperial Beach [REDACTED]
- Temporary realignment of CEU officers working HSI narcotics cases to assist AEU. CEU will only work guideline alien cases.
- Reassignment of three (3) CBPO Creole speakers to interview Haitians.
- Full usage of Barracks 5 with all beds dedicated to OFO detainees of [REDACTED] bed spaces.
- Coordination in process with the Detroit Field Office to do Virtual Processing (Pending schedule and equipment i.e. E-signature pads)
- Coordination in process with the Miami Field Office to do Virtual Processing of Haitians with Creole speakers (Pending scheduling).
- Plan A: Closed Old Port to Process Haitians and converted GSA Offices and GSA garage area into holding rooms of approximately [REDACTED] (May 25, 2016). Supplies ordered – blankets, mats etc.
- Transferred Asylum line from Pedestrian hall to Courtyard for staging.
- Plan B: Process and house Haitian detainees at **Imperial Beach** Station, with the potential to house up to [REDACTED] detainees (not yet activated).

Robert Hood
Customs & Border Protection
Assistant Port Director
San Ysidro Tactical Operations
Desk: [REDACTED]
Cell: [REDACTED]
Email: [REDACTED]

Highly Confidential/Attorneys' Eyes Only

AOL-DEF-00030271

MAYER BROWN LLP
Matthew H. Marmolejo (CA Bar No. 242964)
mmarmolejo@mayerbrown.com
350 S. Grand Avenue
25th Floor
Los Angeles, CA 90071-1503
Ori Lev (DC Bar No. 452565)
(*pro hac vice*)
olev@mayerbrown.com
Stephen M. Medlock (VA Bar No. 78819)
(*pro hac vice*)
smedlock@mayerbrown.com
1999 K Street, N.W.
Washington, D.C. 20006
Telephone: +1.202.263.3000
Facsimile: +1.202.263.3300

SOUTHERN POVERTY LAW CENTER
Melissa Crow (DC Bar No. 453487)
(*pro hac vice*)
melissa.crow@splcenter.org
1101 17th Street, N.W., Suite 705
Washington, D.C. 20036
Telephone: +1.202.355.4471
Facsimile: +1.404.221.5857

Additional counsel listed on next page
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Al Otro Lado, Inc., *et al.*,

Plaintiffs,

v.

Chad F. Wolf,¹ *et al.*,

Defendants.

Case No.: 17-cv-02366-BAS-KSC

**EXHIBIT 43 IN SUPPORT OF
PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT**

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7 *aguisado@ccrjustice.org*

8 666 Broadway, 7th Floor

9 New York, NY 10012

10 Telephone: +1.212.614.6464

11 Facsimile: +1.212.614.6499

12 SOUTHERN POVERTY LAW CENTER

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14 *sarah.rich@splcenter.org*

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16 *rebecca.cassler@splcenter.org*

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21 AMERICAN IMMIGRATION COUNCIL

22 Karolina Walters (DC Bar No. 1049113) (*pro hac vice*)

23 *kwalters@immcouncil.org*

24 1331 G St. NW, Suite 200

25 Washington, D.C. 20005

26 Telephone: +1.202.507.7523

27 Facsimile: +1.202.742.5619

Case 3:17-cv-02366-BAS-KSC Document 767-20 Filed 09/30/21 PageID.67124 Page 3 of 5

From: CASTILLO, MOISES
Sent: Saturday, May 28, 2016 2:13 PM
To: AKI, SIDNEY K; HOOD, ROBERT W
CC: MARIN, MARIZA
Subject: RE: SYS AEU movement and pass down for 5/27/2016 1400-2200

[REDACTED]

Consulate employees are also making donations to the shelters that are housing the people that were moved yesterday.

[REDACTED]

From: AKI, SIDNEY K
Sent: Friday, May 27, 2016 10:52 PM
To: HOOD, ROBERT W <[REDACTED]>
Cc: MARIN, MARIZA <[REDACTED]>; CASTILLO, MOISES <[REDACTED]>
Subject: RE: SYS AEU movement and pass down for 5/27/2016 1400-2200

We are not prepared and we told BP that we were not going this weekend.

Please guide our team to process cases and only focus on processing case at this time. Let's hold the line the best we can. Please call and muster the supervisors and focus them on the task. Thx.

From: HOOD, ROBERT W
Sent: Saturday, May 28, 2016 12:46:33 AM
To: HOOD, ROBERT W; AKI, SIDNEY K
Cc: MARIN, MARIZA; CASTILLO, MOISES
Subject: RE: SYS AEU movement and pass down for 5/27/2016 1400-2200

Sir,

[REDACTED]

Respectfully,

From: HOOD, ROBERT W
Sent: Friday, May 27, 2016 10:31:26 PM
To: AKI, SIDNEY K
Cc: MARIN, MARIZA; CASTILLO, MOISES
Subject: FW: SYS AEU movement and pass down for 5/27/2016 1400-2200

Sir,

Below are the numbers. [REDACTED]

It looks like 28 Haitians were completed and 20 VP.

From: PORTOCARRERO, WILSON
Sent: Friday, May 27, 2016 10:18:30 PM
To: SYS AEU
Subject: SYS AEU movement and pass down for 5/27/2016 1400-2200

San Ysidro AEU Detainee Movement for May 27, 2016 (1400-2200)

- (3) Detainees Transported to BK5
- (2) Detainees Paroled by CBP

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AOL-DEF-00303657

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- (7) Detainees Paroled by ICE-ERO

Total movement: (12) detainees moved

Other Movement

- (14) Detainees Transported to Imperial Beach BP Station
- (15) Detainees Transported to Brownfield BP Station

Total Movement: (29) Detainees Moved

Subjects brought into AEU from PAX and Asylum line (43)

START of Shift Numbers		END of Shift Numbers	
CASA	CEU/ICE	CASA	CEU/ICE
0	0	0	0
CAI	MEX CONSUL	CAI	MEX CONSUL
0	4	0	5
BK5	HOSPITAL	BK5	HOSPITAL
61	1	61	1
OLD PORT	CELL 4	OLD PORT	CELL 4
199	1	203	0
Brown Field	Imperial Bch	Brown Field	Imperial Bch
7	0	4	12
ON SITE	ASYLUM LINE	On Site	Asylum Line
636	0	716	15

SYS CASES PROCESSED	
ER/CF	0
NTA-R	28
CUBAN	0
NTA-D	5
UAC	2
ER	0
TGIS (NEG)	0
TTRT	7
TTRT Mismatch	7
WD	0
VWR	0
VEHICLE CASE	0
TOTAL	49

Virtual Processed Cases	
Murrieta	0
San Ysidro	0
El Centro BP	3
Winterhaven OFO	2
Long Beach	3
Tecate	3
San Diego Airport	0
Ft Lauderdale	4
MIAMI	5
TOTAL	20

Turnover Notes:

- You will start with 716 detainees on-site.
- Mexico is bringing 24 asylees from their facility to be processed at 1400 hrs. so you will have 24 to start your intaking at the beginning of your shift. ****38 were actually brought into the Asylum line****
- All of the detainees were taken into AEU.
- AEU brought 15 from Otay Mesa's asylum and were taken to SYS asylum line.
- Old Port has 203 detainees plus 245 old port warehouse.
- Deaf Detainee in custody was unable to establish communication on swings. We need to determine if she can sign, and proceed from there.

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AOL-DEF-00303658

Case 3:17-cv-02366-BAS-KSC Document 767-20 Filed 09/30/21 PageID.67126 Page 5 of 5

- Fraud cases were brought from Otay Mesa and have been taken into SYS AEU.
- Pending Priority TARS will need to be ready for the PA in the morning.
- Detainees transported to IMB and Brownfield BP Stations.
- Mexico will be bringing 20 Haitians to our asylum lane.
- 1 vehicle cases pending.
- 0 CTR/TGIS pending.

Previous Notes:

- 1 Japanese VWPR meet and greet emailed and confirmed with SAN. Detainee will depart on May 28, 2016.
- 1 Haitian female infant ([REDACTED]) admitted to Radys Children's Hospital. Bullets sent. STILL AT HOSPITAL.
- 2 Daily Placement schedule were created one for AEU and one for Old Port.
- Haitian ([REDACTED]) POC will call with update on bus ticket, ticket was purchased for downtown SD, will call with new time for bus ticket from SYS bus station.
- Have old port monitor closely the detainees. Several complaints from job options for restrooms.

Wilson Portocarrero
Supervisory Customs and Border Protection Officer
SD National Frontline Recruiting Command
Tactical Terrorism Response Team
Admissibility Enforcement Unit
San Ysidro Port of Entry
[REDACTED]

1 MAYER BROWN LLP
2 Matthew H. Marmolejo (CA Bar No. 242964)
3 mmarmolejo@mayerbrown.com
4 350 S. Grand Avenue
5 25th Floor
6 Los Angeles, CA 90071-1503
7 Ori Lev (DC Bar No. 452565)
8 (pro hac vice)
9 olev@mayerbrown.com
10 Stephen M. Medlock (VA Bar No. 78819)
11 (pro hac vice)
12 smedlock@mayerbrown.com
13 1999 K Street, N.W.
14 Washington, D.C. 20006
15 Telephone: +1.202.263.3000
16 Facsimile: +1.202.263.3300

17 SOUTHERN POVERTY LAW CENTER
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20 melissa.crow@splcenter.org
21 1101 17th Street, N.W., Suite 705
22 Washington, D.C. 20036
23 Telephone: +1.202.355.4471
24 Facsimile: +1.404.221.5857

25 *Additional counsel listed on next page*
26 *Attorneys for Plaintiffs*

27 **UNITED STATES DISTRICT COURT**
28 **SOUTHERN DISTRICT OF CALIFORNIA**

29 Al Otro Lado, Inc., *et al.*,

30 Plaintiffs,

31 v.

32 Chad F. Wolf,¹ *et al.*,

33 Defendants.

Case No.: 17-cv-02366-BAS-KSC

**EXHIBIT 69 IN SUPPORT OF
PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
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FOR SUMMARY JUDGMENT**

FILED UNDER SEAL

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3 *bazmy@ccrjustice.org*

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5 *gschwarz@ccrjustice.org*

6 Angelo Guisado (NY Bar No. 5182688) (*pro hac vice*)

7 *aguisado@ccrjustice.org*

8 666 Broadway, 7th Floor

9 New York, NY 10012

10 Telephone: +1.212.614.6464

11 Facsimile: +1.212.614.6499

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13 Sarah Rich (GA Bar No. 281985) (*pro hac vice*)

14 *sarah.rich@splcenter.org*

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23 *kwalters@immcouncil.org*

24 1331 G St. NW, Suite 200

25 Washington, D.C. 20005

26 Telephone: +1.202.507.7523

27 Facsimile: +1.202.742.5619

28

From: MCALEENAN, KEVIN K
Sent: Friday, November 11, 2016 3:00 PM
To: Owen, Todd C (AC OFO); WAGNER, JOHN P
Subject: RE: Metering in TX

Thanks. The implementation here is subject to your discretion and theirs (and PDs') on what will work best operationally and whether it is required on any given day or any specific location. We should try to bring INAMI on board with us and certainly give them a heads up. I just want our folks to have an additional tool to keep conditions safe and working at our POEs. Thanks Todd

From: Owen, Todd C (AC OFO)
Sent: Friday, November 11, 2016 2:55:27 PM
To: MCALEENAN, KEVIN K; WAGNER, JOHN P
Subject: RE: Metering in TX

Deputy, we are on board with the metering. Wanted to express this verbally with the SWB DFOs as opposed to a written record. I thought we had advised them via telephone last night to start, and that this would be among the various custody issues to discuss in more depth next week. We will call the 4 DFOs right now.

Todd C. Owen
Executive Assistant Commissioner
Office of Field Operations
U.S. Customs & Border Protection

From: MCALEENAN, KEVIN K
Sent: Friday, November 11, 2016 7:48:19 PM
To: Owen, Todd C (AC OFO); WAGNER, JOHN P
Subject: Metering in TX

EAC/DEAC,
Just wanted to touch base directly because I'm not sure it was conveyed with full clarity from CAT. CI and I briefed SI that we wanted to increase efforts to meter arrivals of non-UAC, non-Mexican CF cases mid-bridge. If INAMI is not willing to help, we will push up to the line and hold them back there. This will be mostly CENTAM families. Please advise if you have concerns and let me know how implementation goes.
KM

EXHIBIT

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AOL-DEF-00272935

Page 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

AL OTRO LADO, INC., ET AL.,
PLAINTIFFS,
VS.
KEVIN K. MCALEENAN, ET AL.,
DEFENDANTS.

) IN THE DISTRICT COURT
)
)
) CASE NO.
) 17-cv-02366-BAS-KSC
)
)
)
)
)
)

CONFIDENTIAL
ORAL AND VIDEOTAPED DEPOSITION OF
SAMUEL CLEAVES
MAY 20, 2020

ORAL AND VIDEOTAPED DEPOSITION of SAMUEL CLEAVES,
produced as a witness at the instance of the Plaintiff,
and duly sworn, was taken in the above-styled and
numbered cause on May 20, 2020, from 8:59 a.m. to 5:04
p.m., Mountain Time, before Delia Ordonez, CSR in and
for the State of Texas, reported by machine shorthand,
via Webex Magna LegalVision.

Magna Legal Services
866.624.6221
www.MagnaLS.com



A P P E A R A N C E S

FOR THE PLAINTIFFS:

Matthew Fenn
Sydney Fields
Mayer Brown
1999 K Street, N.W.
Washington, D.C. 20006
202.263.3221
Mfenn@mayerbrown.com
Sfields@mayerbrown.com

FOR THE DEFENDANTS:

Katherine J. Shinnars
Ari Nazarov
U.S. Department of Justice
Office of Immigration Litigation
Ben Franklin Station, P.O. Box 868
Washington, D.C. 20044
202.598.8259
Katherine.j.shinnars@usdoj.gov
Ari.Nazarov@usdoj.gov

Rebecca Cassler
Southern Poverty Law Center
1101 17th Street, N.W., Suite 705
Washington, D.C. 20036
202.355.4471

ALSO PRESENT:

Evan McCulloch
Louisa Slocum, CBP

THE VIDEOGRAPHER:

Solange Tran

THE MAGNA LEGAL TECHNICIAN:

Kevin Cranford



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EXHIBITS

ORAL AND VIDEOTAPED DEPOSITION OF

2

SAMUEL CLEAVES

MAY 20, 2020

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NO.

DESCRIPTION

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Metering Guidance

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FRE 1006 Summary of Impact to
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Defendants' Supplemental and
Amended Responses to
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24

Exhibit 171

AOL-DEF-00038270

163

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Exhibit 172

AOL-DEF-00037758

171

1

EXHIBITS

ORAL AND VIDEOTAPED DEPOSITION OF

2

SAMUEL CLEAVES

MAY 20, 2020

3

4

NO.

DESCRIPTION

P A G E

5

Exhibit 173 Beto O'Rourke Twitter Video

175

6

Exhibit 174 AOL-DEF-00095574

189

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Exhibit 175 AOL-DEF-00799450

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Exhibit 176 AOL-DEF-00808783

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Exhibit 177 AOL-DEF-00845774

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Exhibit 178 AOL-DEF-00811791

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Exhibit 179 AOL-DEF-00838795

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Exhibit 180 AOL-DEF-00851607

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Exhibit 181 AOL-DEF-00842504

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Page 6

1 THE VIDEOGRAPHER: We are now on the
2 record. This begins Media No. 1 in the deposition of
3 Sam Cleaves in the matter of Al Otro Lado, Inc., et al.
4 versus Kevin K. McAleenan, et al., in the United States
5 District Court Southern District of California.

6 Today is Wednesday, May 20th, 2020, and the
7 time is 9:59 a.m. This deposition is being held
8 remotely at the request of Mayer Brown, LLP.
9 Videographer is Solange Tran, our trial tech, Kevin
10 Cranford, and the court reporter is Delia Ordonez, all
11 through Magna Legal Services.

12 Will counsel and all parties present please
13 state their appearances and who they represent?

14 MR. FENN: Matthew Fenn from Mayer Brown,
15 and I represent the plaintiffs.

16 MS. FIELDS: Sydney Fields from Mayer
17 Brown, also for the plaintiffs.

18 MS. SHINNERS: Katherine Shinnners from U.S.
19 Department of Justice for the defendants.

20 MR. NAZAROV: Ari Nazarov, also from the
21 U.S. Department of Justice, for the defendants.

22 MS. SHINNERS: And we have agency counsel
23 present from U.S. Customs and Border Protection, Louisa
24 Slocum, and Evan McCulloch on the phone.

25 THE VIDEOGRAPHER: Will the court reporter



1 please swear in the witness?

2 SAMUEL CLEAVES,

3 having been first duly sworn, testified as follows:

4 EXAMINATION

5 BY MR. FENN:

6 Q. Good morning, Mr. Cleaves. Thank you for
7 taking the time to testify today -- we -- we appreciate
8 it -- under more challenging circumstances than -- than
9 normal.

10 A. Yes, sir.

11 Q. My name is Matt Fenn, and I represent the
12 plaintiffs in this action, as you just heard. Before we
13 begin, I'd like to go over some ground rules. This is a
14 one-way conversation in which I and my colleague,
15 Ms. Fields, will ask you questions, and you answer them.
16 So that the court reporter can accurately record your
17 testimony, you must give audible responses, no head
18 shakes, no "uh-huhs." Do you understand that?

19 A. Yes.

20 Q. And as you've probably seen already, given the
21 web format and the slight time lag in the audio
22 transmission, it's even more important than usual that
23 we not talk over each other. So if you could please
24 wait until I finish a question before answering it, I
25 will also do my best to wait for you to finish your



1 phrase "operational capacity" anywhere in -- in the
2 columns and information in this chart, do you?

3 A. No.

4 Q. There is a column that says: "Do you have any
5 UDAs in line waiting on the Mexico side? If yes, how
6 many?"

7 Do you see that column?

8 A. Yes.

9 Q. Can you explain to me what UDAs are?

10 A. Undocumented aliens.

11 Q. And this particular report indicates that the
12 Columbus Port of Entry has [REDACTED] detainees in custody,
13 which equates to 25 percent of the Columbus Port of
14 Entry's capacity; is that right?

15 A. Yes.

16 Q. So if my math is correct, as of the date of
17 this report, the capacity at the Columbus Port of Entry
18 was [REDACTED] detainees; is that correct?

19 A. Yes.

20 Q. Okay.

21 MR. FENN: If we could pull up Exhibit 163,
22 please.

23 Q. (BY MR. FENN) I'm showing you what will be
24 marked as Exhibit 163 to your deposition. It is a
25 multipage Federal Rule of Evidence 1006 Summary Exhibit



1 entitled "El Paso Port of Entry: Impact to Port
2 Operations."

3 Do you see that?

4 A. I see the title, yes.

5 Q. And I will represent to you that this document
6 summarizes the capacity and impact to port operations
7 portions of every queue management report produced by
8 defendants with data for the Port of El Paso from
9 June 16th, 2018, through December 31st, 2018.

10 Can you please look at the entry for
11 June 19th, 2018?

12 A. Yes.

13 Q. On that date, capacity for the Port of El Paso
14 was listed as 95 percent; is that correct?

15 A. Yes.

16 Q. But the Impact to Port Operations column lists
17 the impact to port operations for that day as "no
18 impact," correct?

19 A. That's what it says.

20 MS. SHINNERS: And objection. This -- this
21 assumes the accuracy of the summary of the documents.

22 You can answer, Mr. Cleaves.

23 A. Yes.

24 MR. FENN: Okay. Now I'd like to look at
25 the entries from July 17th, 2018, through July 20th,

1 2018. It should be on the next page of the exhibit.

2 Q. (BY MR. FENN) And again, we're looking at
3 July 17th, 2018, through July 20th, 2018. On those
4 dates, the Port of El Paso was listed at 110 percent
5 capacity, 110 percent capacity, 85 percent capacity, and
6 97 percent capacity respectively; is that correct?

7 A. Yes, that's what it says.

8 Q. And yet the impact to port operations for those
9 days is listed as "minimal impact"; is that correct?

10 A. That's what it says.

11 Q. What does the word "minimal" mean to you in
12 ordinary conversation?

13 A. Small. However, this report is definitely not
14 used in ordinary conversation.

15 Q. So if something is having a minimal con- -- a
16 minimal impact, will you agree that its impact is small?

17 A. I would agree that whatever was happening at
18 the port at the time, we were able to handle it with
19 minimal impact to normal operations, which would include
20 everything at the port.

21 Q. Okay. I'd like to shift gears a little bit and
22 discuss the manner in which metering is implemented at
23 the ports of entry in the El Paso Field Office.

24 But before doing so, I'd like to define the
25 term "limit line." If I use that term, I mean the



1 location at which officers stand when assigned to
2 conduct queue management operations at a port of
3 operation. Do you understand that?

4 A. Yes, okay.

5 Q. So let's talk about Paso del Norte first. From
6 2016 to the present, at any time, have asylum seekers
7 been metered at Paso del Norte?

8 MS. SHINNERS: Object to the form.

9 THE WITNESS: I --

10 MS. SHINNERS: Go ahead, Mr. Cleaves.

11 THE WITNESS: I -- okay. Yeah. I just
12 wanted to make sure.

13 A. From 2016 until now at the Paso del Norte
14 border crossing, metering has been conducted, yes.

15 Q. (BY MR. FENN) And do you know when metering
16 began at the Paso del Norte border crossing?

17 A. Yes. It was in November of 2016 for three
18 weeks, ended in December of 2016, began again in May of
19 2018. It was pretty consistent until January of 2020.
20 And in February of 2020, we started pulling back on
21 metering, stopped metering periodically because the
22 Mexican Immigration had reported that we had reached the
23 end of the line. So everyone that was waiting to be
24 processed had been processed. They had no one else
25 left. So throughout February, they would either have



1 small numbers waiting or none at all of 20 --
2 February 2020.

3 Q. And when you say you had -- you had "reached
4 the end of the line," are you referring to specifically
5 asylum seekers who are waiting at the Paso del Norte
6 crossing or at the El Paso Port of Entry in general?

7 MS. SHINNERS: Objection, form.

8 A. I should have clarified that, yes. For the
9 Port of El Paso in general. In other words, migrants
10 waiting in Ciudad Juárez for processing, Mexican
11 Immigration was reporting that we had reached the end of
12 those people waiting in late January of 2020.

13 Q. (BY MR. FENN) So in late January of 2020,
14 there was nobody -- there were no migrants waiting to
15 cross the border into the El Paso Port of Entry in
16 Ciudad Juárez?

17 A. Yes. Mexican Immigration, that's what they
18 reported.

19 Q. When an asylum see- -- seeker approaches the
20 limit line at the Paso del Norte border crossing, are
21 they told to wait in Mexico?

22 MS. SHINNERS: Object to the form.

23 A. No, they're not given any specific location.
24 They're told that we're unable to take in any for
25 processing at this time, and they would have to wait.



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

AL OTRO LADO, INC., a California Corporation; ABIGAIL DOE, BEATRICE DOE, CAROLINA DOE, DINORA DOE, INGRID DOE, and JOSE DOE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

KIRSTJEN NIELSEN, Secretary, U.S. Department of Homeland Security, in her official capacity; KEVIN K. MCALEENAN, Acting Commissioner, U.S. Customs and Border Protection, in his official capacity; TODD C. OWEN, Executive Assistant Commissioner, Officer of Field Operations, U.S. Customs and Border Protection, in his official capacity,

Defendants.

Case No. 17-cv-02366-BAS-KSC

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS THE COMPLAINT**

[ECF No. 135]

This case concerns an alleged practice in which U.S Customs and Border Protection ("CBP") officials at ports of entry ("POE") along the U.S.-Mexico border deny asylum seekers access to the U.S. asylum process. The Defendants in this case are Kirstjen Nielsen, the Secretary of the U.S. Department of Homeland Security; Kevin K. McAleenan, Acting Commissioner of CBP; and Defendant Todd C. Owen, the Executive Assistant Commissioner of the Office of Field Operations for CBP.

Each Defendant has a role in the direction and oversight of CBP and each is sued in his or her official capacity. Defendants move to dismiss the Complaint in its entirety pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 135.) Plaintiffs oppose (ECF No. 143) and Defendants have replied in support (ECF No. 145). For the reasons herein, the Court grants in part and denies in part Defendants' motion to dismiss.

I. BACKGROUND

A. Relevant Statutory and Regulatory Background¹

At the heart of this case are several provisions of the Immigration and Nationality Act ("INA") and its implementing regulations which elaborate a procedure by which asylum seekers who arrive at POEs may seek asylum in the United States—a procedure Plaintiffs refer to as "access to the U.S. asylum process."² (*See generally* ECF No. 1, Compl.) The INA generally provides that "[a]ny alien who is physically present in the United States or who arrives in the United States [], irrespective of such alien's status, may apply for asylum in accordance with . . . where applicable, section 1225(b)[.]" 8 U.S.C. § 1158(a)(1).

An alien who arrives in the United States, including at a designated POE, is

¹ The Court relies on portions of the statutory and regulatory background identified in the Complaint and the parties' briefing to outline the relevant background for the purposes of this opinion. (*See* Compl. ¶¶ 104–118; ECF No. 135-1; ECF No. 143.) The Court does not include all aspects of the statutory and regulatory scheme concerning asylum.

² Defendants take issue with Plaintiffs' use of the phrase "access to the asylum process," asserting that "Plaintiffs misstate the law" because the INA does not use that phrase. (ECF No. 135-1 at 5 n.2.) However, Defendants themselves use the phrase "asylum process" to refer to the statutory provisions identified in the Complaint. (ECF No. 67-3 Ex. B.) The Court does not understand the phrase "access to the asylum process" as a statement of the law itself, but rather as a shorthand to collectively describe certain provisions of the INA and its implementing regulations at issue in this case. The Court similarly uses this shorthand in this opinion.

1 deemed an “applicant for admission,” who “shall be inspected by immigration
2 officers,” and may be removed “without further hearing” “if an immigration officer
3 determines” that the alien “is inadmissible.” *See* 8 U.S.C. § 1225(a)(1); 8 U.S.C. §
4 1225(a)(3); 8 U.S.C. § 1182(a). The INA, however, treats asylum seekers differently.

5 An “alien [who] indicates either an intention to apply for asylum under section
6 1158 . . . or a fear of persecution” is excepted from this summary removal. 8 U.S.C.
7 § 1225(b)(1)(A)(i). Instead, “[i]f an immigration officer determines that an alien . . .
8 who is arriving in the United States . . . is inadmissible . . . and the alien indicates
9 either an intention to apply for asylum under section 1158 of this title or a fear of
10 persecution, the officer shall refer the alien for an interview by an asylum officer[.]”
11 8 U.S.C. § 1225(b)(1)(A)(ii). An implementing regulation similarly requires that if a
12 noncitizen in expedited removal proceedings asserts an intention to apply for asylum
13 or a fear of persecution, “the inspecting officer shall not proceed further with removal
14 of the alien until the alien has been referred for an interview by an asylum officer[.]”
15 8 C.F.R. § 235.3(b)(4). The regulation further mandates that “the examining
16 immigration officer shall record sufficient information in the sworn statement to
17 establish and record that the alien has indicated such intention, fear, or concern, and
18 to establish the alien’s inadmissibility.” *Id.*

19 An alien seeking asylum is subsequently referred to an “asylum officer,” who
20 is statutorily required to be “an immigration officer who has had professional training
21 in country conditions, asylum law, and interview techniques comparable to that
22 provided to full-time adjudicators of applications under section 1158 of this title,” and
23 “is supervised by an officer who,” *inter alia*, “has had substantial experience
24 adjudicating asylum applications.” 8 U.S.C. § 1225(b)(1)(E). The INA further
25 elaborates the conduct of asylum officers in the interview and a process for removal
26 if the officer determines that an alien does not have a credible fear of persecution. 8
27 U.S.C. § 1225(b)(1)(B).

28 At any point during this process, “[a]n alien applying for admission may, in the

1 discretion of the Attorney General and at any time, be permitted to withdraw the
 2 application for admission and depart immediately from the United States.” 8 U.S.C.
 3 § 1225(a)(4). An implementing regulation further provides that “the alien’s decision
 4 to withdraw his or her application for admission must be made voluntarily[.]” 8
 5 C.F.R. § 235.4.

6 **B. Factual Synopsis**

7 The Plaintiffs are six individuals, Plaintiffs Abigail Doe, Beatrice Doe,
 8 Carolina Doe, Dinora Doe, Ingrid Doe, and Jose Doe (collectively, the “Individual
 9 Plaintiffs”), and organizational Plaintiff Al Otro Lado, Inc. (“Al Otro Lado”).³ They
 10 allege that CBP officials have “systematically violated U.S. law and binding
 11 international human rights law by refusing to allow individuals . . . who present
 12 themselves at POEs along the U.S.-Mexico border and assert their intention to apply
 13 for asylum or a fear of returning to their home countries—to seek protection in the
 14 United States.” (Compl. ¶¶ 1–6, 37.) Plaintiffs allege that “[b]y refusing to follow
 15 the law, Defendants are engaged in an officially sanctioned policy or practice[.]” (*Id.*
 16 ¶ 5.)

17 Plaintiffs point to several reports from non-governmental organizations
 18 working in the U.S.-Mexico border region and Al Otro Lado’s firsthand account,
 19 which describe instances in which CBP officials denied asylum seekers who
 20 presented themselves at POEs along the border access to the U.S. asylum process
 21 between December 2015 and June 2017. (*Id.* ¶¶ 37–39, 96–103.) Plaintiffs allege
 22 that CBP officials have carried out this practice through misrepresentations, threats
 23 and intimidation, verbal and physical abuse, and coercion. (*Id.* ¶¶ 84–103.) For
 24 example, CBP officials are alleged to turn away asylum seekers by falsely informing
 25

26 ³ The Court granted each of the Individual Plaintiffs permission to proceed
 27 pseudonymously in this litigation due to their asserted fears for their physical safety.
 28 (ECF No. 138.) Accordingly, each of these names is a fictitious name used by an
 Individual Plaintiff solely for the purposes of this litigation.

1 them that the U.S. is no longer providing asylum, that President Trump signed a new
 2 law ending asylum, that a law providing asylum to Central Americans ended, that
 3 Mexican citizens are not eligible for asylum, and that the U.S. is no longer accepting
 4 mothers with children for asylum. (*Id.* ¶ 85.) CBP officials are alleged to intimidate
 5 asylum seekers by threatening to take away their children if they do not renounce a
 6 claim for asylum and to deport the asylum seekers. (*Id.* ¶ 87.) CBP officials are also
 7 alleged to force asylum seekers to sign forms in English, without translation, in which
 8 the asylum seekers recant their fears of persecution. (*Id.* ¶ 92.) CBP officials are
 9 further alleged to instruct the asylum seekers to recant their fears of persecution while
 10 being recorded on video. (*Id.* ¶ 92.) The Court briefly sets forth the Individual
 11 Plaintiffs' and Al Otro Lado's experiences of these alleged practices.

12 The Individual Plaintiffs

13 Plaintiffs Abigail Doe ("A.D."), Beatrice Doe ("B.D."), and Carolina Doe
 14 ("C.D.") are natives and citizens of Mexico, each of whom fled with their families to
 15 Tijuana, Mexico, where they attempted to access the U.S. asylum process. (Compl.
 16 ¶¶ 19–21.) Plaintiff A.D. sought to flee Mexico in May 2017 after her husband
 17 disappeared at the hands of a Mexican drug cartel. A cartel member threatened her
 18 with death. (*Id.* ¶¶ 19, 39–40.) She alleges that CBP officials at the San Ysidro POE
 19 coerced her into signing a form which falsely stated that she did not have a fear of
 20 returning to Mexico and withdrew her application for admission to the U.S., and
 21 forced her and her children to return to Mexico. (*Id.* ¶¶ 41–45.) Plaintiff B.D. sought
 22 to flee Mexico in May 2017 with her nephew and three children after the Zetas, a
 23 Mexican drug cartel in southern Mexico, targeted her nephew, and after she suffered
 24 severe domestic violence from her husband. (*Id.* ¶¶ 20, 46–47.) She presented herself
 25 at the Otay Mesa POE and twice at the San Ysidro POE, where CBP officials coerced
 26 her into signing a form in which she stated that she and her children have no fear of
 27 returning to Mexico and withdrew her application for admission. (*Id.* ¶¶ 48–54.)
 28 Plaintiff C.D. sought to flee Mexico in May 2017 with her three children after a drug

1 cartel kidnapped and dismembered her brother-in-law and subsequently targeted her
2 family with death and severe harm. (*Id.* ¶¶ 21, 55–56.) She alleges that CBP officials
3 coerced her into recanting her fear on video and into signing a form withdrawing her
4 application for admission to the U.S. (*Id.* ¶¶ 57–60.)

5 Plaintiffs Dinora Doe (“D.D.”), Ingrid Doe (“I.D.”), and Jose Doe (“J.D.”) are
6 natives and citizens of Honduras. (*Id.* ¶¶ 22–24.) Plaintiff D.D. alleges that MS-13
7 gang members threatened to kill her and her 17-year old daughter if they did not leave
8 their home, and subsequently repeatedly raped her and her daughter over a three-day
9 period. (*Id.* ¶¶ 22, 61–62.) D.D. and her daughter fled to Mexico where MS-13 gang
10 members threatened them again. (*Id.* ¶ 63.) On three occasions in August 2016, D.D.
11 and her daughter sought asylum in the United States at the Otay Mesa POE, but CBP
12 officials told her that “there was no asylum in the United States,” including
13 specifically “for Central Americans,” and that she “would be handed over to Mexican
14 authorities and deported to Honduras.” (*Id.* ¶¶ 64–69.) Plaintiff I.D. alleges that 18th
15 Street gang members in Honduras murdered her mother and three siblings and that
16 the gang threatened her with death. (*Id.* ¶¶ 23, 71.) She also alleges that her partner
17 in Honduras severely abused her and her three children for several years, and
18 regularly raped her, including in front of her children. (*Id.* ¶¶ 23, 72.) In June 2017,
19 I.D. and her children fled to Tijuana and sought asylum at the Otay Mesa and the San
20 Ysidro POEs, where CBP officers told them that they could not seek asylum in the
21 U.S. (*Id.* ¶¶ 73–77.) Plaintiff J.D. alleges that 18th Street gang members murdered
22 several of his family members in Honduras. He further alleges that gang members
23 attacked him and threatened to kidnap and harm his two daughters. (*Id.* ¶¶ 24, 78–
24 79.) J.D. fled Honduras in June 2017 and sought asylum at the Laredo, Texas POE,
25 but CBP officers told him he could not get asylum in the United States. (*Id.* ¶¶ 80–
26 82.)

27 At the time the Complaint was filed, the Individual Plaintiffs alleged that they
28 “would like to present themselves again to seek asylum, but based on their experience

1 and the experience of others with CBP’s practice at POEs, [they] understand that they
2 would likely be turned away again[.]” (*Id.* ¶¶ 44, 53, 59, 68, 76, 81.) They also allege
3 that they are not alone. Rather, CBP officials are alleged to have a “prevalent and
4 persistent” illegal practice since summer 2016 of denying other asylum seekers who
5 present themselves at POEs along the U.S.-Mexico border access to the U.S. asylum
6 system. Accordingly, the Individual Plaintiffs seek to represent a class of individuals
7 with similar claims. (*Id.* ¶¶ 131–138 (class allegations).)

8 Al Otro Lado

9 Al Otro Lado is a non-profit California legal services organization established
10 in 2014, which provides services to indigent deportees, migrants, refugees, and their
11 families. (Compl. ¶ 12; Decl. of Erika Pinheiro, ECF No. 90–1 (“Pinheiro Decl.”) ¶
12 2.) Al Otro Lado’s mission is to coordinate and to provide screening and legal
13 representation for individuals in asylum and other immigration proceedings, seek
14 redress for civil rights violations, and provide assistance with other legal and social
15 services. (Compl. ¶ 12; Pinheiro Decl. ¶ 2.) Since December 2015, its representatives
16 have accompanied asylum seekers to the San Ysidro POE and witnessed the alleged
17 conduct of CBP officials. (Compl. ¶ 101.) In response to the alleged practices of
18 CBP officials, Al Otro Lado has diverted significant time and resources from its L.A.
19 operations and several of its non-refugee programs to send representatives to Tijuana.
20 (*Id.* ¶¶ 14, 16–17; Pinheiro Decl. ¶¶ 4, 6–7.) Al Otro Lado has altered its previous
21 “large-scale, mass-advisal legal clinics” in Tijuana that provided a general overview
22 on asylum laws and procedures to provide individualized assistance and direct
23 representation of asylum seekers, which has required Al Otro Lado to recruit and train
24 more attorneys. (Compl. ¶¶ 13–14; Pinheiro Decl. ¶¶ 3–4.) Al Otro Lado expends
25 significant time and resources to provide individual screenings and in-depth trainings
26 to educate asylum seekers about CBP’s conduct and challenge the alleged practices.
27 (*Id.* ¶ 14; Pinheiro Decl. ¶ 4.)
28

1 **C. Relevant Procedural Background**

2 Plaintiffs filed the putative class action Complaint in the Central District of
 3 California on July 12, 2017. (ECF No. 1.) The Complaint presses three claims against
 4 the Defendants related to the INA provisions. Plaintiffs allege that (1) Defendants
 5 have violated various provisions of the INA that together constitute a “right to seek
 6 asylum under the [INA],” (Compl. ¶¶ 139–150); (2) the INA statutory violations also
 7 violate the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* (Compl. ¶¶
 8 151–164) (asserting claims under Sections 706(1) and 706(2) of the APA); and (3)
 9 Defendants have violated Plaintiffs’ Fifth Amendment procedural due process rights
 10 based on the alleged failure to comply with the INA’s statutory protections (*id.* ¶¶
 11 165–176). Plaintiffs also assert claims pursuant to the Alien Tort Statute (“ATS”),
 12 28 U.S.C. § 1350, for Defendants’ alleged “violation of the *non-refoulement*
 13 doctrine,” a doctrine which Plaintiffs contend is a “specific, universal, and obligatory
 14 norm,” “which has also achieved the status of a *jus cogens* norm.” (Compl. ¶¶ 177–
 15 185). Plaintiffs seek declaratory and injunctive relief for their claims. (*Id.* at 52–53.)

16 **II. LEGAL STANDARDS**

17 **A. Rule 12(b)(1) and Federal Court Jurisdiction**

18 Pursuant to Rule 12(b)(1), a party may move to dismiss based on the court’s
 19 lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A defendant may
 20 challenge the court’s subject-matter jurisdiction in several ways, two of which are
 21 raised by Defendants’ motion to dismiss: mootness and sovereign immunity. When
 22 a defendant challenges the Article III standing of a plaintiff or the related issue of
 23 mootness, Rule 12(b)(1) is the appropriate standard of review because it is the court’s
 24 subject-matter jurisdiction which is challenged. *White v. Lee*, 227 F.3d 1214, 1242
 25 (9th Cir. 2000) (“Mootness . . . pertain[s] to a federal court’s subject-matter
 26 jurisdiction under Article III, [so it is] properly raised in a motion to dismiss under
 27 [Rule] 12(b)(1).”). A Rule 12(b)(1) motion is also “a proper vehicle for invoking
 28 sovereign immunity from suit.” *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir.

2015). When the United States is sued or a suit implicates its sovereign immunity, a waiver of sovereign immunity is deemed a prerequisite for jurisdiction. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (“Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.”); *Jachetta v. United States*, 653 F.3d 898, 903 (9th Cir. 2011) (“It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”) (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). When sovereign immunity is invoked as the basis for the absence of subject-matter jurisdiction, “[a]s the party asserting a claim against the United States, [the plaintiff] has the burden of ‘demonstrating an unequivocal waiver of immunity.’” *United States v. Park Place Associates, Ltd.*, 563 F.3d 907, 924 (9th Cir. 2009) (quoting *Cunningham v. United States*, 786 F.2d 1445, 1446 (9th Cir. 1986)).

B. Rule 12(b)(6) and the Sufficiency of the Complaint

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint set forth “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A defendant may move to dismiss a complaint on the ground that its allegations fail to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion tests the sufficiency of a complaint’s allegations. *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). To survive such a motion, a plaintiff is required to set forth “enough facts to state a claim for relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw reasonable inferences that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Factual allegations must be enough to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 556. In assessing the sufficiency of a complaint, a court

1 accepts as true the complaint’s factual allegations and construes them in the light most
 2 favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Yet,
 3 the court need not accept as true legal conclusions pled in the guise of factual
 4 allegations. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).
 5 A pleading is insufficient if it offers only “labels and conclusions” or “a formulaic
 6 recitation of the elements of a cause of action,” without adequate factual allegations.
 7 *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 676. Generally, a court assesses a
 8 complaint’s sufficiency based on its allegations, but a court may consider materials
 9 properly submitted as part of the complaint to resolve a Rule 12(b)(6) motion to
 10 dismiss. *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001).

11 **III. DISCUSSION**

12 **A. Mootness**

13 In the days following the filing of the Complaint, Defendants agreed to process
 14 the Individual Plaintiffs for inspection and to permit them to access the asylum
 15 process. The agreement provides that: “[t]he government agrees to allow the class
 16 representatives and their children to present themselves at the San Ysidro and Laredo
 17 ports of entry and access the credible fear, withholding-only, or asylum process as
 18 appropriate under the [INA].” (ECF No. 67-3 Ex. B.) Three Individual Plaintiffs
 19 were processed at the San Ysidro POE on July 15, 2017 and another was processed
 20 on July 18, 2017. (ECF No. 135-2 Ex. A ¶ 4.) A fifth Individual Plaintiff was
 21 processed at the Laredo, Texas POE on July 18, 2017. (ECF No. 135-3 Ex. B. ¶ 4.)
 22 According to the Defendants, these five Individual Plaintiffs have been either referred
 23 to the asylum process or placed in removal proceedings. (ECF No. 135-1 at 1, 3.)

24 The parties have different views about what this means for the Court’s
 25 jurisdiction. Defendants contend that the Individual Plaintiffs’ Section 706(1) claims
 26 are now moot and so the Court should dismiss the entire case. (*Id.* at 1, 4–9.)
 27 Defendants assert that the Individual Plaintiffs have received “all the relief the Court
 28 could have granted” on their Section 706(1) claims: “the verifiable opportunity to be

1 processed as applicants for admission” at a POE along the U.S.-Mexico border
 2 consistent with the INA’s provisions. (*Id.* at 3, 6.) Plaintiffs argue that the Section
 3 706(1) claims are not moot because (1) Plaintiff Beatrice Doe has not been processed
 4 for admission and therefore has not “actually received” the relief and (2) the
 5 Individual Plaintiffs who have been processed for admission only received “partial
 6 relief.” (ECF No. 143 at 11.) Plaintiffs further argue that all Individual Plaintiffs
 7 who “crossed the U.S.-Mexico border” have a “continuing interest in pursuing a Rule
 8 23 class action” for the conduct challenged in this case. (*Id.* at 11, 14.)

9 Article III limits the jurisdiction of the federal courts to “cases” or
 10 “controversies.” U.S. Const. art. III, § 2; *see also Allen v. Wright*, 468 U.S. 737, 750
 11 (1984). Because of this Article III limitation, a plaintiff must show the “irreducible
 12 constitutional minimum” of standing to invoke the federal judicial power: (1) an
 13 “injury in fact,” (2) fairly traceable to the challenged action of the defendant, (3)
 14 which is “likely” to be redressed by a favorable judicial decision. *Lujan*, 504 U.S. at
 15 560–61. “This requirement ensures that the Federal Judiciary confines itself to its
 16 constitutionally limited role of adjudicating actual and concrete disputes, the
 17 resolution of which have direct consequences on the parties involved.” *Genesis*
 18 *Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013). Standing frames mootness.
 19 Mootness is “the doctrine of standing set in a time frame: the requisite personal
 20 interest that must exist at the commencement of litigation (standing) must continue
 21 throughout its existence (mootness).” *U.S. Parole Comm’n v. Geraghty*, 445 U.S.
 22 388, 397 (1980). To avoid mootness, “an actual controversy must be extant at all
 23 stages of review, not merely at the time the complaint is filed.” *Arizonans for Official*
 24 *English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks and citation
 25 omitted). When a case becomes moot, a federal court must dismiss it for lack of
 26 jurisdiction. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086–87 (9th Cir. 2011).

27 To resolve Defendants’ mootness challenge, the Court first considers whether
 28 the Individual Plaintiffs’ receipt of Section 706(1) relief could alone moot this case—

1 it does not—and, second, whether the Individual Plaintiffs’ Section 706(1) claims
 2 asserted on behalf of a putative class warrant a mootness exception—they do. In
 3 considering these issues, the Court keeps in mind that “[t]he party asserting mootness
 4 has a heavy burden to establish that there is no effective relief remaining for a court
 5 to provide.” *In re Palmdale Hills Property*, 654 F.3d 868, 874 (9th Cir. 2011); *San*
 6 *Luis & Delta-Mendota Water Auth. v. United States DOI*, 870 F. Supp. 2d 943, 953
 7 (E.D. Cal. 2012).

8 **1. This Case is Not Moot**

9 Defendants’ argument that this case is moot ignores organizational Plaintiff Al
 10 Otro Lado’s presence in this case and the Individual Plaintiffs’ other requests for
 11 relief. “A case becomes moot only when it is impossible for a court to grant any
 12 effectual relief whatever to the prevailing party.” *Knox v. SIEU, Local 1000*, 567 U.S.
 13 298, 307 (2012); *Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F.3d 1011,
 14 1018 (9th Cir. 2010) (internal quotations and citation omitted) (a case is moot when
 15 there is no “present controversy as to which effective relief can be granted”). “[A]s
 16 long as the parties have a concrete interest, however small, in the outcome of the
 17 litigation, the case is not moot.” *Knox*, 567 U.S. at 307–08 (quoting *Ellis v. Railway*
 18 *Clerks*, 466 U.S. 435, 442 (1984)). Setting aside whether the Individual Plaintiffs’
 19 Section 706(1) claims are moot, this case is not moot given that it remains possible
 20 for the Court to grant effectual relief to Al Otro Lado and the Individual Plaintiffs.

21 **a. Al Otro Lado**

22 Faced with Al Otro Lado’s argument that it possesses Article III standing,
 23 Defendants assert that they do not “yet dispute[] Al Otro Lado’s Article III standing.”
 24 (ECF No. 145 at 8.) Despite Defendants’ assertion, the Court has an independent
 25 duty to assess whether Al Otro Lado satisfies Article III’s “irreducible constitutional
 26 minimum” of standing. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)
 27 (“The federal courts are under an independent obligation to examine their own
 28 jurisdiction, and standing ‘is perhaps the most important of [the jurisdictional]

doctrines.” (quoting *Allen*, 468 U.S. at 750)). The Court readily concludes that Al Otro Lado has Article III standing.

An organizational plaintiff like Al Otro Lado may have Article III standing to sue in its own right. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). “An organization has ‘direct standing to sue [when] it show[s] a drain on its resources from both a diversion of its resources and frustration of its mission.’” *Valle Del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (quoting *Fair Hous. Council of San Fernando Valley v. Roomate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012)). Of course, “[a]n organization cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that would not otherwise affect the organization[.]” *La Asociacion de Trabajadores de Lake Forest v. Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). Al Otro Lado satisfies this test.

Al Otro Lado is a non-profit that provides services to indigent deportees, migrants, refugees, and their families in Los Angeles, California and Tijuana, Mexico. Its core mission is, *inter alia*, to coordinate and provide screening, advocacy, and legal representation for individuals in asylum and other immigration proceedings. (Compl. ¶ 12.) As a result of CBP officers’ conduct at POEs along the U.S.-Mexico border since 2016, Al Otro Lado alleges that it has diverted significant time and resources from its L.A. operations and its non-refugee programs to send representatives to Tijuana to provide individualized assistance and coordination of legal and social services, including individual screenings and in-depth trainings to educate asylum seekers about CBP’s alleged conduct of denying the most basic form of access to the asylum process. (*Id.* ¶¶ 14, 16–18.) These alleged harms are sufficient for Article III standing. See *Valle Del Sol Inc.*, 732 F.3d at 1018 (organization had standing because its diverted resources from its core mission to address constituents’ concerns); *Smith v. Pac. Props & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (finding standing where an organization alleged that “[it] has had . . . to divert its scarce resources from other efforts . . . to benefit the disabled

community in other ways”). Accordingly, Al Otro Lado has an interest in this case that is not mooted by Defendants’ post-Complaint conduct.⁴

b. The Individual Plaintiffs’ Other Claims for Relief

For the Individual Plaintiffs, Defendants’ mootness challenge is narrow. It concerns only one form of relief in the Complaint on only one of the Plaintiffs’ four claims. (*See* Compl. ¶¶ 152–153.) But the Individual Plaintiffs request other forms of relief, including: (1) “relief prohibiting Defendants” and their agents “from engaging in the unlawful policies, practices, acts and/or omissions . . . at POEs along the U.S.-Mexico border” and (2) “relief requiring Defendants to implement procedures to provide effective oversight and accountability in the inspection and processing of individuals who present themselves at POEs along the U.S.-Mexico border and indicate an intention to apply for asylum or assert a fear of persecution in their home countries.” (*Id.* at 52–53.) The Complaint also requests a declaratory judgment that “Defendants’ policies, practices, acts and/or omissions . . . violate” the INA, the APA, the Due Process Clause of the Fifth Amendment, and/or the “duty of *non-refoulement* under international law.” (*Id.* at 52.) Defendants make no meaningful attempt to argue that their agreement to process the Individual Plaintiffs moots these requests for injunctive and declaratory relief.

Rather, Defendants’ mootness argument treats these requests as irrelevant on the ground that Plaintiffs’ other claims fail because the Plaintiffs do not plausibly allege that Defendants have a policy or practice. But a “party’s prospects of success on a claim are not pertinent to the mootness inquiry.” *Looks Filmproduktionen GmbH v. CIA*, 199 F. Supp. 3d 153, 179 (D.D.C. 2016) (internal quotations and alterations

⁴ “The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others.” *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993). However, because the parties dispute the ability of the Individual Plaintiffs to seek Section 706(1) relief for the putative class in this case, the Court does not limit its mootness analysis to organizational Plaintiff Al Otro Lado.

omitted) (quoting *Schnitzler v. United States*, 761 F.3d 33, 39 (D.C. Cir. 2014)); *see also Aracely, R. v. Nielsen*, No. 17-cv-1976-RC, —F. Supp. 3d—, 2018 WL 3243977, at *15 (D.D.C. July 3, 2018); *Ramirez v. ICE*, 310 F. Supp. 3d 7, 18 (D.D.C. 2018). Defendants’ argument that Plaintiffs’ other claims are moot because there is no policy or practice “confuses mootness with the merits.” *Chafin v. Chafin*, 568 U.S. 165, 166 (2013). “[J]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action[.]” *Bell v. Hood*, 327 U.S. 678, 682 (1946); *see also Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 642–43 (2002) (“It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction.” (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 89 (1998))); *Eubanks v. McCotter*, 802 F.2d 790, 793 (5th Cir. 1986) (“If federal jurisdiction turned on the success of a plaintiff’s federal cause of action, no such case could ever be dismissed on the merits.”).

Even on the merits, Defendants’ argument cannot show that this entire case is moot because it conflates whether the Complaint plausibly shows the existence of a policy with whether the Complaint plausibly shows the existence of a practice. As the Court later explains, although the Complaint fails to show the existence of a policy, it plausibly shows the existence of a pattern or practice of denials faced by some asylum seekers. Accordingly, the Court cannot find that this entire case is moot by virtue of Defendants’ agreement to process the Individual Plaintiffs.

2. The Section 706(1) Claims Are Not Moot

Although this *case* is not moot, Defendants’ narrow mootness argument squarely raises the issue whether the Section 706(1) *claims* for relief asserted in the Complaint are. “A lawsuit—or an individual claim—becomes moot when a plaintiff actually receives all of the relief he or she could receive on the claim through further litigation.” *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1144 (9th Cir. 2016) (emphasis added). The Court must consider whether the agreement moots all the Section 706(1)

claims asserted in this case and concludes that it does not. Al Otro Lado asserts APA claims, including a Section 706(1) claim, yet the agreement does not purport to provide any relief to Al Otro Lado. The Individual Plaintiffs also assert Section 706(1) claims on behalf of a putative class—a point Defendants’ motion to dismiss elides. *See Pitts*, 653 F.3d at 1087 (“The distinction between issues that have become moot and parties whose interest in the issue may have become moot is especially visible in the context of class actions.”).

a. Al Otro Lado’s APA Claims

Defendants’ Section 706(1) mootness challenge contains a key omission: Plaintiff Al Otro Lado’s Section 706(1) claim. (Compl. ¶¶ 151, 159–164.) Defendants omit discussion of any of Al Otro Lado’s APA claims by assuming the merits of their separate argument that Al Otro Lado fails the zone of interests test applicable to claims asserted pursuant to the APA. (ECF No. 135 at 10–11.) The Court does not find that argument to be meritorious.⁵

“In addition to [Article III’s standing] requirements, a plaintiff bringing suit under the [APA] for a violation of [a statute] must show that his alleged injury falls within the ‘zone of interests’ that [the statute] was designed to protect.” *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001). “[T]he breadth of the zone of interests varies according to the provisions of law at issue[.]” *Bennett v. Spear*, 520 U.S. 154, 163 (1997). Courts “presume that a statutory cause of action extends only to plaintiffs whose interests ‘fall within the zone of interests protected by the law invoked.’” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129

⁵ The Court recognizes that the zone of interests test does not itself implicate the Court’s subject matter jurisdiction, but rather whether a particular plaintiff has a statutory cause of action. *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1155 (9th Cir. 2015) (citing *Lexmark Int’l, Inc. v. Static Control Components*, 572 U.S. 118, 127–28 (2014)). Because Defendants’ mootness argument concerns the Plaintiffs’ Section 706(1) claims, however, the Court addresses whether Al Otro Lado may assert any APA causes of action in this case as part of its mootness analysis.

(2014) (quoting *Allen*, 468 U.S. at 751). The APA’s “‘zone of interests’ test is ‘not meant to be especially demanding,’ and a court should deny standing only ‘if the plaintiff’s interests are *so marginally related to or inconsistent with* the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.’” *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1177 (9th Cir. 2004) (quoting *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987)) (emphasis added). The test does not require a specific congressional purpose to benefit the would-be plaintiff. *Clarke*, 479 U.S. at 399–400. And the “benefit of any doubt goes to the plaintiff.” *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

Defendants first argue that *Al Otro Lado* fails the zone of interests test because it does not cite any INA provision permitting it to sue. (ECF No. 135 at 10–11.) This argument is unavailing. “The APA confers a general cause of action upon persons ‘adversely affected or aggrieved by action within the meaning of the relevant statute,’ but withdraws that cause of action to the extent the relevant statute ‘preclude[s] judicial review.’” *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984); see also *Reeb v. Thomas*, 636 F.3d 1224, 1226 (9th Cir. 2011) (same); *Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1098 (D. Ariz. 2009) (same). Defendants do not purport to argue that the INA itself precludes judicial review in this case.

Defendants’ second argument is that *Al Otro Lado* “ha[s] failed to plead sufficient facts to demonstrate that [it] has statutory standing as a legal advocacy group to pursue a claim under 8 U.S.C. §§1158 or 1225.” (ECF No. 145 at 8.) Defendants ground this argument in an opinion decided by a single Supreme Court justice, which granted the government’s application to stay a district court’s injunction order entered in favor of several legal organizations pending appeal. See *INS v. Legalization Assistance Project of L.A. Cty. Fed’n of Labor*, 510 U.S. 1301 (1993) (O’Connor, J.) [hereinafter “*L.A.P.*”]. *L.A.P.* concerned the Immigration Reform and Control Act of 1986 (“IRCA”), a statute which created a limited amnesty

1 period for certain undocumented aliens to seek legalization. Considering whether to
 2 grant a stay, Justice O'Connor "predict[ed]" that "this Court would grant certiorari
 3 and conclude that the respondents"—organizations "that provide legal help to
 4 immigrants"—"are outside the zone of interests IRCA seeks to protect, and that
 5 therefore they had no standing to seek the order entered by the District Court." *Id.* at
 6 1302, 1305. She reasoned that although IRCA provided a role for legal help
 7 organizations during the amnesty period in the role of "so-called 'qualified designated
 8 entities,'" there was "no indication" that IRCA was addressed to the interests of the
 9 organizations, but rather it was "clearly meant to protect" the interests of
 10 undocumented aliens. *Id.* at 1305 (citing 8 U.S.C. § 1255(a)(2)). Defendants argue
 11 that, like the respondent organizations who Justice O'Connor predicted the Supreme
 12 Court would find as outside IRCA's zone of interests, Al Otro Lado falls outside the
 13 INA's zone of interests. The Court rejects this argument.

14 As an initial matter, the precedential value of Justice O'Connor stay opinion is
 15 questionable. Justice O'Connor recognized that her task in deciding whether to grant
 16 a stay was a "difficult and speculative inquiry" that required her "to predict whether
 17 four Justices would vote to grant certiorari and whether the Court would then set the
 18 order aside." *L.A.P.*, 510 U.S. at 1304. In relevant part, her zone of interests answer
 19 to that concededly speculative inquiry did not prove true. The Court granted certiorari
 20 and, instead of adopting Justice O'Connor's merits reasoning, it vacated the judgment
 21 below and remanded to the Ninth Circuit for further consideration in light of, *inter*
 22 *alia*, *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993). *See INS v. L.A.P.*,
 23 510 U.S. 1007 (1993). Given the posture of Justice O'Connor's opinion and the
 24 Supreme Court's ultimate disposition, this Court does not view *L.A.P.* as binding. *See*
 25 *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 502 & n.2 (M.D. Pa. 2007)
 26 ("Because of the nature of [*L.A.P.*]—a speculative opinion by one Supreme Court
 27 Justice sitting as a Circuit Court Justice—and the fact the decision served only to
 28 delay implementation of an order pending appeal, we do not consider that opinion as

1 binding, but rather as persuasive authority.”), *aff’d in part and rev’d in part on other*
 2 *grounds by*, 620 F.3d 170 (3d Cir. 2010), *vacated and remanded on other grounds*
 3 *by*, 563 U.S. 1030 (2011).

4 Setting aside its questionable precedential value, the Court does not find
 5 *L.A.P.*’s reasoning helpful because *L.A.P.* concerned IRCA’s zone of interests—not
 6 the INA. This distinction is important. Justice O’Connor’s analysis cannot be
 7 isolated from the cases her opinion discussed, which narrowly interpreted standing to
 8 sue under IRCA even as applied to undocumented aliens. For example, Justice
 9 O’Connor began her opinion with a discussion of *Reno*, decided some five months
 10 earlier and which the INS argued required vacating the district court’s order. *L.A.P.*,
 11 510 U.S. at 1303. In *Reno*, the Supreme Court held that “the only people who could
 12 ask for injunctive or declaratory relief under IRCA” from an alleged administrative
 13 INS “front-desking policy” of discouraging legalization applications were those to
 14 whom that policy was directly applied. *L.A.P.*, 510 U.S. at 1303 (quoting *Reno*, 509
 15 U.S. at 61–67). *Reno*’s view of standing was adopted in *Ayuda, Inc. v. Reno*, 7 F.3d
 16 246 (D.C. Cir. 1993), a decision with which Justice O’Connor viewed the decisions
 17 of the district court and Ninth Circuit in *L.A.P.* as in “conflict.” *L.A.P.*, 510 U.S. at
 18 1305. In *Ayuda, Inc.*, the D.C. Circuit held that “in light of the [*Reno*] analysis, it is
 19 now quite clear that the organizational plaintiffs did not have standing to raise their
 20 claims challenging INS policies or regulations that interpreted aliens’ rights to
 21 legalization under IRCA.” *Ayuda, Inc.*, 7 F.3d at 251 (citing *Reno*, 509 U.S. at 61)
 22 (vacating district court orders for lack of jurisdiction).⁶ Placed in context, Justice
 23

24 ⁶ The INS’s petition for a writ of certiorari in *L.A.P.* is also illuminative. The
 25 INS argued that the Ninth Circuit’s treatment of the organizational standing question
 26 was “in substantial tension” with the D.C. Circuit’s earlier opinion in *Ayuda, Inc.*
 27 *L.A.P.*, Petition for Writ of Certiorari, 510 U.S. 1007 (1993) (No. 93-73), 1993 WL
 28 13076006, at *8 (citing *Ayuda, Inc. v. Thornburgh*, 880 F.3d 1325, 1339 (D.C. Cir.
 1989), *vacated on other grounds by*, 498 U.S. 1117 (1991)). The earlier *Ayuda*
 opinion determined that “qualified designated entities” (“QDEs”) established by

O'Connor's view of IRCA's zone of interests says much about the restrictive judicial treatment of challenges concerning IRCA and little about the INA's zone of interests.

Courts have not interpreted the INA's zone of interests as narrowly as IRCA's and non-alien plaintiffs, including organizational plaintiffs, have been permitted to assert claims based on the INA.⁷ See *Hawaii v. Trump*, 859 F.3d 741, 766 (9th Cir. 2017) (finding that plaintiff states' "efforts to enroll students and hire faculty members who are nationals from six countries" affected by president order fell within zone of interests), *vacated on other grounds by Trump v. Hawaii*, 138 S. Ct. 377 (2017); *Doe v. Trump*, 288 F. Supp. 3d 1045, 1067–68 (W.D. Wash. 2017) (relying on *Hawaii* to conclude that two organizational plaintiffs fell within the zone of interests of the INA and the Refugee Act of 1980 because of their "core mission" involved "[m]aking provisions for the resettlement and absorption of refugees"); *V. Real Estate Group, Inc. v. United States Citizenship & Immigration Servs.*, 85 F.

IRCA fell outside IRCA's zone of interests because "Congress, at most, intended the QDEs to act as intermediaries, not litigating ombudsmen. And even if the QDEs are thought of as agents for the aliens, we doubt Congress intended the agents to have broader rights to seek judicial review than do the principals." *Ayuda, Inc.*, 880 F.3d at 1339.

⁷ Other district courts have found that organizational plaintiffs like Al Otro Lado can fall within the INA's zone of interests when it has members or clients targeted by the government action. See *Vidal v. Nielsen*, 291 F. Supp. 3d 260, 269 n.3 (E.D.N.Y. 2018) (determining that organizational plaintiff met zone of interests test to challenge DACA rescission because it had members, clients, and employees who received DACA); see also *NAACP v. Trump*, 298 F. Supp. 3d 209, 235 (D.D.C. 2018) (determining that organizational plaintiffs falls within INA's zone of interests because "each has members who are DACA beneficiaries and whose interests consequently fall within the zone of interests regulated by the INA"). Although Al Otro Lado has not expressly invoked representative standing as the basis for its Article III standing in this case, the asylum seekers Al Otro Lado serves and represents are ostensibly its clients. *Vidal* and *NAACP* provide a persuasive basis for the conclusion that Al Otro Lado would likely also fall within the INA's zone of interests on this basis as well.

Supp. 3d 1200, 1209 (D. Nev. 2015) (company could sue for USCIS’s revocation of an EB-5 foreign investor visa because its “interest . . . is more than just marginally related to the statutes’ purpose since the company was actually founded with the intent that its model would satisfy the requirements of the EB-5 program and bring Chinese investors to the country.”).

The specific INA provisions in this case evince a congressional intent that aliens—including those arriving at POEs and those facing expedited removal—have “an opportunity . . . to have the merits of his or her claim promptly assessed by officers.” *Castro v. United States Dep’t of Homeland Sec.*, 163 F. Supp. 3d 157, 161 (E.D. Pa. 2016) (quoting H.R. Rep. No. 104-828, at 209–10 (1996) (Conf. Rep.)); *see also* 8 U.S.C. § 1158; 8 U.S.C. § 1225. Al Otro Lado alleges that part of its mission is to serve and represent asylum and refugee seekers. (Compl. ¶ 12.) In furtherance of this mission, Al Otro Lado established and operates its Refugee Program in Tijuana, Mexico, which services individuals who wish to seek asylum in the United States. (*Id.* ¶ 13.) The alleged conduct of CBP officers has caused Al Otro Lado to expend significant time and resources to assist asylum seekers in responding to CBP officials’ alleged conduct of foreclosing even the most basic aspect of the INA’s asylum procedures—the opportunity to be processed in the first place. (*Id.* ¶¶ 12–15.) This Court finds Al Otro Lado’s interests in this case “are related to the basic purposes of the INA[’s]” goal of permitting aliens to apply for asylum in the United States at POEs and not so marginally related that its interests fall outside the INA’s zone of interests. *Hawaii*, 859 F.3d at 766; *Doe v. Trump*, 288 F. Supp. 3d at 1067–68. Accordingly, the Court rejects Defendants’ challenge to Al Otro Lado’s INA-based claims.

b. The Individual Plaintiffs’ Section 706(1) Claims

Five of the six Individual Plaintiffs have received the requested relief from Defendants’ agreement to process these “class representatives and their children” at POEs. Thus, their Section 706(1) claims are moot unless an exception applies.

1 Plaintiffs contend, however, that the Section 706(1) claim of Beatrice Doe is not moot
2 because she has not “actually received” the relief provided in the agreement. (ECF
3 No. 143 at 11.) The Court does not share Plaintiffs’ view.

4 Plaintiffs’ argument relies solely on case law holding that a rejected or
5 unaccepted Rule 68 offer of judgment does not moot a plaintiff’s individual claims
6 even when that offer would provide full relief. *See Chen*, 819 F.3d at 1136; *Diaz v.*
7 *First. Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954–55 (9th Cir. 2013) (“[A]n
8 unaccepted offer that would . . . fully satisf[y] a plaintiff’s claim does not render that
9 claim moot.”). This is true of an unaccepted settlement offer as well. *See Campbell-*
10 *Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016).

11 Defendants’ agreement, however, is not a Rule 68 offer of judgment or a
12 settlement offer and thus *Chen* and *Diaz* are not directly applicable. Even if the
13 reasoning of these cases extends to less formal offers, what is before the Court is not
14 an *offer* which Beatrice Doe has yet to accept or reject, but rather an *agreement*. The
15 agreement permits her to be processed by CBP officials at a POE in accordance with
16 the INA and has no expiration. The evidence shows that five of the six Individual
17 Plaintiffs were processed pursuant to the agreement and there is no basis for the Court
18 to find that Beatrice Doe will be treated any differently. Defendants readily concede
19 that Beatrice Doe “can return to a port of entry to be processed as an arriving alien at
20 any time, should she choose to do so” pursuant to the agreement. (ECF No. 135-1 at
21 3.) And they “fully expect that ‘she would be processed as an applicant for
22 admission[.]’” (ECF No. 145 at 2 (quoting ECF No. 135-2 Ex. A ¶ 4).). Beatrice
23 Doe is in no different a position than she would be with a court order compelling
24 agency action. Accordingly, her individual Section 706(1) claim, like those of the
25 other Individual Plaintiffs, is moot unless an exception applies.

26 Even when a claim becomes moot due to subsequent events after the
27 commencement of a lawsuit, “the flexible character of the Art[icle] III mootness
28 doctrine” may warrant the exercise of jurisdiction over the claim. *United States*

1 *Parole Comm’n v. Geraghty*, 445 U.S. 388, 401 (1980); *see also San Luis & Delta-*
 2 *Mendota Water Auth.*, 870 F. Supp. 2d at 958 (“Even if a case is technically moot, it
 3 may nevertheless be judicable if one of three exceptions to the mootness doctrine
 4 applies,” including “‘for wrongs capable of repetition yet evading review.’”) (quoting
 5 *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964–66 (9th Cir. 2007)). Under
 6 the “capable of repetition, yet evading review” exception, a claim is justiciable
 7 notwithstanding mootness if: (1) there is “a ‘reasonable expectation’ that the same
 8 party will confront the same controversy again” and (2) if the underlying dispute is
 9 “inherently limited in duration such that it is likely always to become moot before
 10 federal court litigation is completed.” *W. Coast Seafood Processors Ass’n v. NRDC*,
 11 643 F.3d 701, 704 (9th Cir. 2011) (quoting *Feldman v. Bomar*, 518 F.3d 637, 644
 12 (9th Cir. 2008)), *id.* at 705 (quoting *Ctr. for Biological Diversity*, 511 F.3d at 965
 13 (internal quotations omitted)). The parties dispute whether this exception applies.

14 Defendants argue that it does not. (ECF No. 135-1 at 8.) In Defendants’ view,
 15 “[t]here is no reason to anticipate that the Doe Plaintiffs . . . will return to a [POE] as
 16 applicants for admission in the future, or that, upon doing so, they will not be properly
 17 processed, especially considering the low percentage rate of improper processing[.]”
 18 (*Id.*) It is unclear what basis there is for Defendants’ assertion. Unless the Individual
 19 Plaintiffs are granted asylum, there is nothing in the Complaint that suggests that they
 20 will not attempt to seek asylum again and, if so, that CBP officers will not turn them
 21 away from a POE. Each Individual Plaintiff has alleged that he or she does not wish
 22 to return to his or her home country because of a fear of violence. Each Individual
 23 Plaintiff has also alleged being turned away by CBP officials on multiple occasions
 24 and a practice of such conduct. Even if Defendants are correct that the Complaint
 25 fails to show a blanket policy of turning away asylum seekers at POEs, “the ‘capable
 26 of repetition yet evading review’ exception is not so narrowly circumscribed.” *San*
 27 *Luis & Delta-Mendota Water Auth.*, 870 F. Supp. 2d at 960. Based on the limited
 28 nature of the Court’s review of the pleadings at this stage, the Court cannot say that

1 the Individual Plaintiffs’ allegations do not show a reasonable expectation that they
2 would again be subjected to the conduct they have alleged experiencing.

3 Furthermore, contrary to Defendants’ argument (ECF No. 135-1 at 9), the
4 putative class action nature of this case does change the Court’s analysis regarding
5 the effect of their agreement.⁸ Courts are sensitive to assertions of mootness in the
6 class action context. *See Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51–52 (1991);
7 *Sosna v. Iowa*, 419 U.S. 393, 401 (1975); *Gerstein v. Pugh*, 420 U.S. 103, 110 (1975).
8 The “capable of repetition, yet evading review” mootness exception has a particular
9 application in the class action context when the defendant’s actions after the filing of
10 the complaint moot the proposed class representative’s individual claims. Courts are
11 sensitive to a defendant’s tactics of “picking off lead plaintiffs” so as “to avoid a class
12 action,” even when a proposed class representative’s “claims are not ‘inherently
13 transitory as a result of being time sensitive.’” *Pitts*, 653 F.3d at 1091 (quoting *Weiss*
14 *v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004)). “The end result is the same:
15 a class transitory by its very nature and one transitory by virtue of the defendant’s
16 litigation strategy share the reality that both claims would evade review.” *Id.* Even
17 if the named plaintiff in a putative class action receives “complete relief on [his or
18 her] individual claims . . . before class certification, fully satisfying those individual
19 claims, [the plaintiff] still would be entitled to seek certification.” *Chen*, 819 F.3d at
20 1142.

21 Defendants acknowledge *Pitts* and *Chen*, yet they contend that unlike the
22 defendants in those cases, they have not sought to “buy-off” the Plaintiffs in this case
23 to avoid a class action. (ECF No. 135-1 at 9; ECF No. 145 at 4.) However, Plaintiffs
24

25 ⁸ Central to Defendants’ argument is the notion that “[t]he styling of the
26 Complaint as a putative class action does not change this analysis.” (ECF No. 135-1
27 at 9) Contrary to this characterization of the Complaint, the Complaint contains class
28 action allegations and the conduct at issue is alleged to affect the putative class.
(Compl. ¶¶ 131–138 (the “class action allegations”).) Defendants have not moved to
strike these allegations; they remain an integral feature of the Complaint in this case.

1 seek only declaratory and injunctive relief. The fact that Defendants have provided
 2 one form of the injunctive relief solely to the “class representatives” (ECF No. 67-3
 3 Ex. B) after the filing of this case is no less a potential “buy-off” strategy that
 4 effectively renders transitory the claims they seek to assert on behalf of a putative
 5 class. The government could simply render moot any class action Section 706(1)
 6 claims concerning the conduct at issue in this case by affording relief to any individual
 7 plaintiffs who seek to challenge such conduct as soon as the case is filed and long
 8 before a court could reasonably be expected to rule on a motion for class certification.
 9 *See Haro v. Sebelius*, 747 F.3d 1099, 1110 (9th Cir. 2014) (determining that the
 10 expiration of the plaintiff’s claim one month after filing the lawsuit did not moot the
 11 class’s claim for injunctive relief because “the district court could not have been
 12 expected to rule on a motion for class certification in that period”).

13 Defendants possess the authority to direct CBP officials to process aliens who
 14 present themselves at POEs along the U.S.-Mexico border in accordance with the
 15 requirements of the INA and implementing regulations. Defendants’ agreement to
 16 exercise that authority occurred a mere two days after the filing of the Complaint and
 17 only when confronted with the possibility that Plaintiffs would file an *ex parte* request
 18 for a temporary restraining order that all Individual Plaintiffs be processed at a POE.
 19 (ECF No. 67-1 ¶¶ 2–7.) Under these circumstances, the Court is convinced that the
 20 Section 706(1) claims the Individual Plaintiffs assert on behalf of themselves and the
 21 putative class fall within an exception from mootness.

22 **B. Sovereign Immunity**

23 Defendants’ motion to dismiss also raises the issue of sovereign immunity.
 24 (ECF No. 135-1 at 21; ECF No. 145 at 1.) “Sovereign immunity is a threshold
 25 question that is sometimes described as ‘jurisdictional.’” *Forester v. Chertoff*, 500
 26 F.3d 920, 925 n.5 (9th Cir. 2007) (citing *Irwin v. Dep’t of Veterans Affairs*, 498 U.S.
 27 89, 94 (1990)); *see also Reed v. Dep’t of Homeland Sec.*, No. CV 16-7170 CJC (JC),
 28 2017 WL 2701940, at *3 (C.D. Cal. May 25, 2017) (“Sovereign immunity is a

threshold issue [that] goes to the court’s subject matter jurisdiction.”) (quoting *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1026 (9th Cir. 2010) (en banc), *cert. denied*, 564 U.S. 1037 (2011)).

Plaintiffs sue the named Defendants in their official capacity as United States officers, each of whom is alleged to oversee the enforcement and administration of U.S. immigration laws, including oversight of CBP. (Compl. 1–2 (caption); *id.* ¶¶ 25–27.). “An action against an officer, operating in his or her official capacity as a United States agent, operates as a claim against the United States.” *Ministerio Roca Solida v. McKelvey*, 820 F.3d 1090, 1095 (9th Cir. 2016) (citing *Farmer v. Perrill*, 275 F.3d 958, 963 (10th Cir. 2001)); *see also Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985). Plaintiffs must therefore contend with the sovereign immunity of the United States. *See Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985) (“It has long been held that the bar of sovereign immunity cannot be avoided by naming officers and employees of the United States as defendants.”); *Allen v. United States*, 871 F. Supp. 2d 982, 988 (N.D. Cal. 2012) (the issue of sovereign immunity “includes suits against federal officers in their official capacities to compel them to act”) (citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963)).

“The United States, as a sovereign, is immune from suit *unless* it has waived its immunity.” *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th Cir. 2007) (emphasis added) (citing *Dep’t of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999)); *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). “When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court’s jurisdiction.” *United States v. Mottaz*, 476 U.S. 834, 841 (1986) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *see also Cent. Sierra Envtl. Res. Ctr. v. Stanislaus Nat’l Forest*, 304 F. Supp. 3d 916, 932–33 (E.D. Cal. 2018) (same) (quoting *Balser v. Dep’t of Justice, Office of U.S. Tr.*, 327 F.3d 903, 907 (9th Cir. 2003)). Thus, consistent with sovereign immunity and any waiver of it, a court may only exercise jurisdiction over claims

1 against the United States within the parameters set by Congress.

2 **1. The APA Supplies the Relevant Waiver**

3 The APA “contains a specific waiver of the United States’ sovereign
4 immunity.” *Matsuo v. United States*, 416 F. Supp. 2d 982, 988 (D. Haw. 2006) (citing
5 *Bowen v. Massachusetts*, 487 U.S. 879, 891–92 (1988)). As a general matter, the
6 APA permits suits against the United States by “[a] person suffering legal wrong
7 because of the agency action, or adversely affected or aggrieved by agency action
8 within the meaning of relevant statute.” 5 U.S.C. § 702. This portion of Section 702
9 constitutes the APA’s judicial review provision and dates to the APA’s original
10 enactment in 1946. *See* Administrative Procedure Act, Pub. L. No. 79-404 § 10(a),
11 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 702); *see also Navajo*
12 *Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1168 (9th Cir. 2017). Claims asserted
13 pursuant to the APA must satisfy Section 702’s “agency action” requirement and the
14 further requirement under Section 704 of the APA that a plaintiff must identify a
15 “final agency action” to obtain judicial review. 5 U.S.C. § 704.

16 Apart from Section 702’s judicial review provision for APA claims is the
17 APA’s waiver of sovereign immunity, also located in Section 702. The waiver
18 provides that: “[a]n action in a court of the United States seeking relief other than
19 money damages and stating a claim that an agency or an officer or employee thereof
20 acted or failed to act in an official capacity . . . shall not be dismissed nor relief therein
21 be denied on the ground that it is against the United States.” 5 U.S.C. § 702. This
22 waiver of sovereign immunity was enacted as a 1976 amendment to the APA, which
23 aimed “to clear up a morass of federal sovereign immunity jurisprudence” and “aimed
24 to ‘broaden the avenues for judicial review of agency action by eliminating the
25 defense of sovereign immunity in cases covered by the amendment.’” *Navajo Nation*,
26 876 F.3d at 1168 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 891–92 (1988)).
27 Unlike Section 702’s judicial review provision, which is textually limited to “agency
28 action,” Section 702’s waiver of sovereign immunity contains no such textual

1 limitation. 5 U.S.C. § 702; *see also Navajo Nation*, 876 F.3d at 1171. Accordingly,
 2 as amended, the APA “waives sovereign immunity broadly for all causes of action
 3 that meet its terms” irrespective of whether the claims satisfy the APA’s requirements
 4 for judicial review of an agency action. *Navajo Nation*, 876 F.3d at 1172; *see also*
 5 *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989)
 6 (Section 702 is “an unqualified waiver of sovereign immunity in actions seeking
 7 nonmonetary relief”).⁹ Thus, a plaintiff need only seek nonmonetary relief against
 8 the government in order to avail himself of the APA’s waiver of sovereign immunity.
 9 In this case, Plaintiffs invoke the APA’s waiver and seek only non-monetary relief
 10 against Defendants, based on claims regarding the purported actions and failures to
 11 act of CBP officials and the named Defendants. (Compl. ¶ 10; *id.* at 52–53.)
 12 Accordingly, Plaintiffs’ claims for relief fall squarely within the broad waiver of
 13 sovereign immunity reflected in Section 702.

14 Because the APA supplies the relevant waiver of the sovereign immunity in
 15

16 ⁹ There is Ninth Circuit precedent which suggests that the APA’s sovereign
 17 immunity waiver is tethered to the APA’s requirements for judicial review of APA
 18 causes of action. *See Gallo Cattle Co. v. U.S. Dep’t of Agric.*, 159 F.3d 1194, 1198
 19 (9th Cir. 1998) (determining that the APA’s waiver of sovereign immunity contains
 20 several limitations,” including Section 704’s limitations to review of only “final
 21 agency action” and “agency action otherwise reviewable by statute”); *Tucson Airport*
 22 *Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998) (referring to
 23 Sections 702 and 704 to conclude that “the APA waives sovereign immunity for [a
 24 plaintiff’s] claims only if three conditions are met: (1) its claims are not for money
 25 damages, (2) an adequate remedy for its claims is not available elsewhere and (3) its
 26 claims do not seek relief expressly or impliedly forbidden by another statute.”). In
 27 the face of Ninth Circuit precedent that grafts the APA’s review requirements onto
 28 Section 702’s waiver, the *Navajo Nation* panel attempted to clarify that the APA’s
 waiver exists independently of the APA’s requirements for APA causes of action. *See Navajo Nation*, 876 F.3d at 1171; *id.* at 1172 (summing up conclusion as “the second sentence of § 702 waives sovereign immunity broadly for all causes of action that meet its terms, while § 704’s ‘final agency action’ limitation applies only to APA claims”). This Court finds *Navajo Nation*’s reading of Section 702 persuasive and appropriate, and applies it in this case.

1 this case, the Court can easily reject Defendants’ argument that “Congress has not
 2 waived sovereign immunity to create a private right of action for a *per se* ‘pattern or
 3 practice’ claim against federal law enforcement.” (ECF No. 135-1 at 21; ECF No.
 4 145 at 1.) Setting aside that the Complaint does not separately plead such a claim and
 5 that the Plaintiffs disavow bringing one (*see generally* Compl.; *see also* ECF No. 143
 6 at 19 n.6), Defendants’ argument fails under *Navajo Nation*. Because Plaintiffs’
 7 claims fall within the scope of Section 702’s waiver, they do not need to identify a
 8 separate waiver of sovereign immunity for “pattern or practice” claims against the
 9 government. *See Navajo Nation*, 876 F.3d at 1172 (“§ 702 waives sovereign
 10 immunity broadly for all causes of action that meet its terms[.]”). To the extent
 11 Defendants are arguing that pattern or practice claims are not cognizable under the
 12 APA, that is an issue that concerns the sufficiency of such claims, not whether the
 13 United States or its officers are immune from such claims. *See id.*; *see also Trudeau*
 14 *v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006) (concluding that Section 702’s waiver of
 15 sovereign immunity applies regardless of whether the challenged conduct itself
 16 satisfies the APA’s review provisions).

17 **2. The APA’s Waiver Extends to Plaintiffs’ ATS Claims**

18 The APA’s waiver of sovereign immunity also resolves one of Defendants’
 19 challenges to Plaintiffs’ ATS claims. The Complaint alleges ATS claims against the
 20 Defendants for “violation of the *non-refoulement* doctrine” under international law.
 21 (Compl. ¶ 180.) Defendants argue that the ATS “does not constitute a waiver of
 22 sovereign immunity and therefore does not create a cause of action against the
 23 government.” (ECF No. 135-1 at 11–12 n.5.)¹⁰ Defendants thus appear to suggest
 24

25 ¹⁰ Defendants also argue that although Plaintiffs refer to the “duty of *non-*
 26 *refoulement*” as the basis for their ATS claims, Plaintiffs “fail to explain how it
 27 imposes relevant legal obligations on the government beyond the obligations captured
 28 in 8 U.S.C. § 1225(b)(1)(A)(ii).” (ECF No. 135-1 at 12 n.5.) To the extent that
 Defendants contend that the ATS claims must be dismissed because a remedy is
 available under domestic law, the Court rejects that argument. “Contrary to

1 that this Court lacks jurisdiction over the ATS claims asserted against the Defendants
2 as a matter of sovereign immunity.

3 Defendants are correct that the ATS does not waive the sovereign immunity of
4 the United States. The ATS provides only that “the district courts shall have original
5 jurisdiction of any civil action by an alien for a tort only, committed in violation of
6 the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The text of the
7 ATS says nothing about sovereign immunity and, thus, it cannot be construed as a
8 waiver. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) (internal citations omitted)
9 (stating that “[a] waiver of the Federal Government’s sovereign immunity must be
10 unequivocally expressed in statutory text and will not be implied”). Specifically, the
11 ATS does not waive the government’s sovereign immunity. *Tobar v. United States*,
12 639 F.3d 1191, 1196 (9th Cir. 2011) (“[T]he Alien Tort Statute has been interpreted
13 as a jurisdiction statute only—it has not been held to imply any waiver of sovereign
14 immunity.”).

15 However, at least one appellate court has suggested that the APA is “arguably
16 available” as a waiver of sovereign immunity for claims asserted against federal
17 officers sued in their official capacity for nonmonetary relief. *See Sanchez-Espinoza*
18 *v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) (recognizing the possibility that ATS
19 suits seeking non-monetary relief may proceed against the Secretary of Defense and
20 the Director of the CIA under the APA’s waiver of sovereign immunity). The D.C.
21 Circuit ultimately declined to apply the APA’s waiver to the ATS claims in *Sanchez-*
22 *Espinoza* because it did not believe that the alien plaintiffs in that case who challenged
23

24 defendants’ argument, there is no absolute preclusion of international law claims by
25 the availability of domestic remedies for the same alleged harm.” *See Hawa Abdi*
26 *Jama v. United States INS*, 22 F. Supp. 2d 353, 364 (D.N.J. 1998). Defendants raise
27 no other arguments showing that dismissal of Plaintiffs’ ATS claims is warranted and
28 neither side has briefed the sufficiency of the claims. Accordingly, the Court
expresses no further view on them in this opinion aside from the sovereign immunity
issue.

1 “support for military operations” were entitled to the discretionary declaratory and
 2 injunctive relief available under the APA in an area “so sensitive a[s] foreign affairs.”
 3 *Id.* at 208. The notion that the APA’s waiver of sovereign immunity should not apply
 4 to permit equitable relief in military matters or sensitive foreign affairs cases has been
 5 echoed by other courts. *See, e.g., Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 41–43
 6 (D.D.C. 2010) (questioning “whether the APA should be interpreted as a waiver of
 7 sovereign immunity for an ATS claim like plaintiff’s” against the U.S. Secretary of
 8 Defense and Director of the CIA which requested “discretionary relief that would
 9 prohibit military and intelligence activities against an alleged enemy abroad”).

10 This case, however, does not involve military matters, nor do Defendants argue
 11 that it involves sensitive foreign affairs. At least one district court has applied the
 12 APA’s waiver of sovereign immunity for international law claims asserted against the
 13 U.S. government for non-monetary relief in such circumstances. *See Rosner v. United*
 14 *States*, 231 F. Supp. 2d 1202, 1211–12 (S.D. Fla. 2002). In line with the APA’s broad
 15 waiver of sovereign immunity for claims against the United States for nonmonetary
 16 relief, the Court finds that the APA’s unqualified waiver of sovereign immunity
 17 supplies a waiver for the ATS claims asserted in this case. *See* 5 U.S.C. § 702; *Navajo*
 18 *Nation*, 876 F.3d at 1171.

19 **C. The Sufficiency of the APA Claims**

20 The Complaint asserts two APA claims against the Defendants. First, the
 21 Complaint raises Section 706(1) claims “to compel agency action unlawfully
 22 withheld or unreasonably delayed.” (Compl. ¶ 152 (citing 5 U.S.C. § 706(1).) The
 23 basis of these claims is CBP officials’ alleged “failure to take actions mandated” by
 24 various provisions of the INA and implementing regulations. (*Id.* ¶ 153; *see also id.*
 25 ¶ 157 (referring to “Defendants’ repeated and pervasive failure to act”).) The
 26 Complaint also alleges a Section 706(2) claim to “hold unlawful and set aside agency
 27 action.” 5 U.S.C. § 706(2). The basis of this claim is that “CBP officials have acted
 28 in excess of their statutorily proscribed authority and without observance of the

procedures required by law in violation of the APA.” (*Id.* ¶ 154 (citing 5 U.S.C. §§706(2)(C), (D)), *id.* ¶ 155 (alleging that “in turning Class Plaintiffs . . . away at POEs along the U.S.-Mexico border without following the procedures mandated by the INA, CBP officials have acted in excess of the authority granted them by Congress”); *id.* ¶ 157 (referring to Defendants’ “action taken in excess of their authority”).)

In moving to dismiss, Defendants argue that (1) Plaintiffs’ “only well-pleaded” claims are the Section 706(1) claims and (2) Plaintiffs have failed to identify a “final agency action” necessary to seek review of Defendants’ alleged policy pursuant to Section 706(2). (ECF No. 135-1 at 4–9 (mootness for Section 706(1) claims), 11–20 (failure to state a Section 706(2) claim).) In opposition, Plaintiffs argue that they have pleaded Section 706(1) claims and not brought a Section 706(2) claim. (ECF No. 143 at 19–21.) Independently of their Section 706(1) claims, however, the Plaintiffs contend that they have plausibly pleaded that Defendants have “an illegal policy or practice.” (*Id.* at 21–23.) To resolve the parties’ dispute, the Court first outlines the APA’s framework for judicial review of agency action. The Court then considers the sufficiency of Plaintiffs’ Section 706(1) claims. Finally, the Court determines that Defendants’ alleged policy must be reviewed pursuant to Section 706(2) and concludes that Plaintiffs have failed to identify a final agency action subject to judicial review.

1. Judicial Review of Agency Action Pursuant to the APA

As a general matter, the APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. This judicial review provision “is not so all-encompassing as to authorize . . . judicial review over everything done by an administrative agency.” *Wild Fish Conservancy v. Jewell*, 703 F.3d 791, 800–01 (9th Cir. 2013). The APA confines what is subject to judicial review by limiting review to an “agency action,” which is

1 in turn defined to only “include[] the whole or a part of an agency rule, order, license,
2 sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. §
3 551(13); 5 U.S.C. § 701(b)(2) (incorporating Section 551’s definition of “agency
4 action”).

5 The APA also places limits on when agency action is subject to judicial review.
6 “Agency action made reviewable by statute and final agency action for which there
7 is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704;
8 *see also Navajo Nation*, 876 F.3d at 1171 (“[Section] 704’s requirement that to
9 proceed under the APA, agency action must be final or otherwise reviewable by
10 statute is an independent element without which courts may not determine APA
11 claims.”). “Where no other statute provides a private right of action, the ‘agency
12 action’ complained of must be ‘final agency action.’” *Norton v. S. Utah Wilderness*
13 *Alliance*, 542 U.S. 55, 61–62 (2004) [hereinafter “*SUWA*”] (quoting 5 U.S.C. § 704);
14 *see also Fairbanks N. Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 591
15 (9th Cir. 2008) (referring to “final agency action” as a “jurisdictional requirement
16 imposed by statute”); *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 266 (9th Cir.
17 1990) (same).

18 Section 706 of the APA further defines the “scope of review” for an agency
19 action that is subject to judicial review. As a general matter, a court “shall decide all
20 relevant questions of law” and “interpret constitutional and statutory provisions” as
21 part of its review of agency action “[t]o the extent necessary to decision and when
22 presented.” 5 U.S.C. § 706. In addition, a court may provide relief from agency
23 action in one of two ways. Under Section 706(1), a court “shall . . . compel agency
24 action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). Under
25 Section 706(2), a court “shall hold unlawful and set aside agency action . . . found to
26 be,” *inter alia*, “in excess of statutory jurisdiction, authority, or limitations, or short
27 of statutory rights” or “without observance of procedure required by law.” 5 U.S.C.
28 § 706(2). A challenge to an agency’s alleged failure to act is more appropriately

channeled through Section 706(1). *See Rosario v. United States Citizenship*, No. C15-0813JLR, 2017 WL 3034447, at *7 n.6 (W.D. Wash. July 18, 2017); *Leigh v. Salazar*, No. 3:13-cv-00006-MMD-VPC, 2014 WL 4700016, at *4 (D. Nev. Sept. 22, 2014) (construing a Section 706(2) claim regarding an agency’s alleged failure to act as in fact a Section 706(1) claim). Section 706(2) is typically reserved for completed agency actions whose validity can be assessed according to the bases for setting aside agency action set forth in that provision. *See Nw. Envtl. Defense Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 680–81 & n.10 (9th Cir. 2007). With these general principles in mind, the Court turns to the APA claims in this case.

2. The Complaint States Section 706(1) Claims for “Unlawfully Withheld” Access to the U.S. Asylum Process

The Court turns first to the Individual Plaintiffs’ Section 706(1) claims that CBP officials have failed permit asylum seekers to access the U.S. asylum process. Defendants concede that the Individual Plaintiffs’ Section 706(1) claims are “well-pleaded.” (ECF No. 135-1 at 4–5; ECF No. 145 at 1.) Defendants, however, suggest that such claims are not cognizable insofar as they concern a putative class of other asylum seekers who have experienced the alleged pattern of denials. Plaintiffs in turn argue that they have stated Section 706(1) claims for Defendants’ alleged “failure to act” and that they can challenge a pattern of violations. (ECF No. 143 at 19–20, *id.* at 19 n.6.) Because Section 706(1) claims may be dismissed if the plaintiff fails to show an entitlement to agency action that a court can properly compel, the Court addresses the sufficiency of the Complaint’s Section 706(1) claims as they pertain to the Individual Plaintiffs and the putative class.¹¹ *See Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1019–20 (9th Cir. 2007) (“a Section 706(1) claim may be dismissed for lack of jurisdiction” when plaintiff fails to show he is entitled to relief

¹¹ Defendants do not raise an issue as to whether Al Otro Lado has plausibly stated a claim for Section 706(1) relief.

1 under the provision); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir.
2 2006).

3 **a. The Individual Plaintiffs**

4 Section 706(1) grants a court authority to “compel agency action unlawfully
5 withheld.” 5 U.S.C. §706(1). Under this provision, a court’s “ability to ‘compel
6 agency action’ is carefully circumscribed to situations where an agency has ignored
7 a specific legislative command.” *Hells Canyon Pres. Council v. United States Forest*
8 *Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). When a plaintiff challenges an agency’s
9 alleged failure to act, that challenge must satisfy certain limitations. The APA’s use
10 of the phrase “failure to act” means “a failure to take an *agency action*—that is, a
11 failure to take one of the agency actions (including their equivalents) earlier defined
12 in § 551(13),” *i.e.*, an “agency rule, order, license, sanction, or relief.” *SUWA*, 542
13 U.S. at 62–63; *see also* 5 U.S.C. §551(13). Thus, a Section 706(1) claim “can only
14 proceed where a plaintiff asserts that an agency failed to take a *discrete* agency action
15 that it is *required* to take.” *SUWA*, 542 U.S. at 64 (emphasis in original).

16 These requirements to obtain Section 706(1) relief from a court are mutually
17 reinforcing. The discrete agency action “limitation” precludes a “broad programmatic
18 attack” against an agency. *Id.* As such, it “protect[s] agencies from undue judicial
19 interference with their lawful discretion” and “avoid[s] entanglement in abstract
20 policy disagreements which courts lack both expertise and information to resolve.”
21 *Id.* at 66–67. Thus, a plaintiff “cannot seek wholesale improvements of [a] program
22 by court decree” under the guise of a Section 706(1) claim. *Lujan v. Nat’l Wildlife*
23 *Fed’n*, 497 U.S. 871, 891 (1990); *Public Lands for the People, Inc. v. U.S. Dep’t of*
24 *Agric.*, 733 F. Supp. 2d 1172, 1183 (E.D. Cal. 2010) (“This interpretation effectively
25 precludes enforcement of broad statutory mandates under section 706(1), insofar as a
26 broad mandate typically is not one that requires discrete agency action.”). The
27 “limitation to required agency action rules out judicial direction of even discrete
28 agency action that is not demanded by law.” *SUWA*, 542 U.S. at 65. Because of that

1 limitation, courts “have no authority to compel agency action merely because the
2 agency is not doing something we may think it should do.” *Zixiang Li v Kerry*, 710
3 F.3d 995, 1004 (9th Cir. 2013) (Smith, M.D., J.). Thus, a plaintiff seeking relief under
4 Section 706(1) must identify an actual legal obligation for the agency to take some
5 action. *Id.*

6 The gravamen of Plaintiffs’ Section 706(1) claims is that CBP officials failed
7 to take actions that the INA requires when a noncitizen asserts an intent to seek
8 asylum. The Complaint grounds these claims in various statutory and regulatory
9 provisions, including 8 U.S.C. § 1225(a)(1)(3), 8 U.S.C. § 1225(b)(1)(A)(ii), 8 U.S.C.
10 § 1225(b)(2)(A), and 8 C.F.R. § 235.3(b)(4). (Compl. ¶¶ 104–121, 153.)¹² There is
11 no dispute between the parties regarding the sufficiency of the Individual Plaintiffs’
12 Section 706(1) claims under these provisions. Defendants agree that “APA relief
13 under section 706(1)” is “an appropriate remedy” for the failures to act the Individual
14 Plaintiffs allege. (ECF No. 145 at 1.)¹³ These concessions buttress the Court’s
15

16 ¹² The Complaint’s Section 706(1) claim invokes 8 U.S.C. § 1158(a)(1).
17 (Compl. ¶ 153.) The Court observes that it likely could not compel relief for this
18 statutory provision. 8 U.S.C. § 1158(a)(1) does not identify any specific obligations
19 placed on an immigration officer and, therefore, may not serve as the basis for Section
20 706(1) relief. *See Public Lands for the People, Inc.*, 733 F. Supp. 2d at 1183
21 (“[W]here a statutory directive does not require action, that statute may be so ‘broad’
22 that it cannot be enforced under section 706(1)[.]”). Plaintiffs do not invoke 8 U.S.C.
23 § 1158 in discussing the sufficiency of their Section 706(1) claims and so the Court
24 deems any claims premised on it as waived. The Complaint also invokes 8 C.F.R. §
25 235.4, a regulation which provides that “[t]he alien’s decision to withdraw his or her
application admission must be made voluntarily[.]” (Compl. ¶ 153.) As the Court
discusses separately, Plaintiffs cannot seek Section 706(1) relief with respect to this
regulation and any Section 706(1) claims seeking to compel agency action based on
it are subject to dismissal.

26 ¹³ However, Defendants argue that because the parties agree on what the law
27 requires, “Plaintiffs have failed to identify any legal dispute between the parties,” and
28 thus there is no “live case or controversy.” (ECF No. 135-1 at 19 & n.9.) Defendants’
argument is an inartful attempt to attack Plaintiffs’ Article III standing. To have

1 conclusion that Plaintiffs have stated Section 706(1) claims for discrete and legally
2 required agency actions.

3 **b. The Putative Class and Practice Allegations**

4 A salient aspect of the Complaint are the allegations that there is a “practice”
5 of CBP officials refusing to permit asylum seekers who present themselves at POEs
6 along the U.S.-Mexico border to access the asylum process in the United States. (*See*
7 *generally* Compl.) Plaintiffs’ Section 706(1) claims incorporate these allegations.
8 (*Id.* ¶ 157 (“Defendants’ repeated and pervasive failure to act . . . , which denied Class
9 Plaintiffs access to the statutorily prescribed asylum process . . . mandates relief under
10 the APA.”); *id.* ¶ 163 (alleging that “Defendants’ conduct and practices, as alleged in
11 this Complaint, violate the APA.”).) Defendants primarily take issue with these
12 pattern allegations as a matter of sovereign immunity. As the Court has already
13 concluded, that argument lacks merit. Even so, Defendants’ argument that there is
14 “no cause of action” for pattern or practice claims raises a different issue: whether
15 and how pattern and practice claims are cognizable under the APA.

16 Two courts have considered this issue in the context of Section 706(1) claims
17 based on an agency’s alleged failure to act. These courts concluded that pattern and
18 practice challenges to an agency’s alleged failure to act are not legally cognizable
19 under the APA. *See Californians v. United States EPA*, No. C 15-3292 SBA, 2018
20 WL 1586211, at *19 (N.D. Cal. Mar. 30, 2018) (dismissing separately pleaded claim
21

22 standing, a plaintiff must allege: (1) an injury in fact (2) “fairly traceable to the
23 challenged action of the defendant” (3) that may be “redressed by a favorable
24 decision” from a court. *Lujan*, 504 U.S. at 560–61 (internal citations and quotations
25 omitted). The Complaint plainly shows that the Plaintiffs have standing based on the
26 injuries caused by CBP officials at POEs along the U.S.-Mexico border in violation
27 of the INA and its implementing regulations. This Court has the authority to redress
28 those injuries. *See* 5 U.S.C. § 706(1). The parties’ apparent agreement in their legal
memoranda submitted to this Court on what the INA and its implementing regulations
require cannot vitiate Plaintiffs’ standing based on the harms resulting from CBP
officials’ alleged violations of those provisions.

1 against EPA for an alleged pattern or practice of failing to timely act on administrative
2 complaints); *Del Monte Fresh Produce N.A., Inc. v. United States*, 706 F. Supp. 2d
3 116 (D.D.C. 2010) (dismissing claim against FDA for an alleged unlawful pattern and
4 practice of delay in sampling and inspecting food imported by plaintiff). The
5 reasoning underlying these conclusions turns on Section 706(1)'s discrete agency
6 action limitation. See *Californians*, 2018 WL 1586211, at *19 (citing *Lujan*, 497 U.S.
7 at 891; *SUWA*, 542 U.S. at 66–67); *Del Monte*, 706 F. Supp. 2d at 119 (citing *SUWA*,
8 542 U.S. at 64, 66–67). As the Court has previously discussed, that limitation
9 precludes a plaintiff from using Section 706(1) to launch a “programmatic attack” or
10 seek “wholesale improvement” of an agency’s procedures. *SUWA*, 542 U.S. at 64.
11 Both the *Del Monte* and *Californians* courts determined that the “pattern or practice”
12 claims in those cases were impermissible attacks on the relevant agency.

13 For example, in *Del Monte*, the court concluded that the plaintiffs could not
14 pursue a claim against the FDA for its alleged pattern and practice of not inspecting
15 Del Monte products within a reasonable time period. The *Del Monte* court reasoned
16 that such a claim would require the court to “consider the procedures by which the
17 FDA inspects samples and makes decisions as to their suitability for import” as a
18 general matter. *Del Monte*, 706 F. Supp. 2d at 119. As such, the court would have
19 engaged in “broad review of agency operations” of “just the sort of ‘entanglement’ in
20 daily management of the agency’s business that the Supreme Court has instructed is
21 in appropriate.” *Id.* The *Del Monte* plaintiff never challenged, nor sought relief for
22 specific instances of the FDA’s alleged failure to act or unreasonable delay in taking
23 action despite referring to several such instances. *Id.* at 120 n.6. In *Californians*, the
24 court similarly determined that the plaintiffs’ separately pleaded pattern and practice
25 claim against “the EPA’s general practice in handling [administrative] complaints, as
26 opposed to seeking relief on a specific complaint” was “in effect” “a programmatic
27 attack” on the EPA’s procedures and therefore “impermissible.” *Californians*, 2018
28 WL 1586211, at *19. The court, however, reached this conclusion even as it

determined that the plaintiffs’ other five claims “seek[ing] relief based on the EPA’s failure to act on each of the Plaintiffs’ respective [administrative] complaints” “clearly satisf[ied] the discrete agency action requirement.” *Id.* *Del Monte* and *Californians*, as well as their reliance on *SUWA* and *Lujan*, caution this Court to take a closer look at the practice allegations in this case to ensure that they do not constitute an impermissible broad-based programmatic attack against CBP.

Plaintiffs assert that they have not “attempt[ed] to bring a so-called ‘pattern or practice’ claim as an independent cause of action.” (ECF No. 143 at 19 n.6.) This assertion is supported by the Complaint, which does not facially plead independent Section 706(1) claims for Defendants’ alleged practice of denying asylum seekers who present themselves at POEs along the U.S.-Mexico border access to the asylum process. Instead of raising an independent pattern or practice claim, the Section 706(1) claims incorporate the practice allegations as part of Plaintiffs’ request for relief from “Defendants’ repeated and pervasive failure to act.” (Compl. ¶ 157.) Plaintiffs challenge not only alleged agency failures to act in their particular cases, they challenge CBP officials’ failures to act experienced by other individuals. (*Compare id.* ¶¶ 39–82 (allegations of each Individual Plaintiff’s experiences) *with id.* ¶¶ 83, 85–91, 96(a)–(d), 97, 98(b), (d), 99, 100, 101(a)–(e), 102 (allegations that “CBP officials have systematically denied numerous other asylum seekers access to the asylum process”) *and id.* ¶¶ 131–138 (setting forth “class action allegations”).) Neither *Del Monte*, which involved an attempt to bring a freestanding pattern or practice claim, nor *Californians*, which involved an attempt to plead a pattern or practice claim independently of claims targeting discrete agency actions, is thus on point.

The Court does not view the incorporation of these pattern allegations as an impermissible “programmatic” attack. Unlike this case, *SUWA*, *Lujan*, *Del Monte*, and *Californians*, did not involve Section 706(1) claims asserted on behalf of a putative class of individuals. The Section 706(1) relief is no less discrete and lawfully

1 required simply because it is requested on behalf of a putative class. *See Ramirez*,
2 310 F. Supp. 3d at 21 (“Defendants confuse aggregation of similar, discrete purported
3 injuries—claims that many people were injured in similar ways by the same type of
4 agency action—for a broad programmatic attack.”) (rejecting challenge to Section
5 706(1) relief sought on behalf of class). This conclusion is reinforced by the fact that
6 Section 706(1) claims to compel agency action may be asserted on behalf of a class.
7 *See, e.g., Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1971 (9th Cir. 2016)
8 (affirming district court preliminary injunction in a case involving Section 706(1)
9 claims asserted on behalf of a class of all current or former members of the armed
10 forces who were test subjects in certain government programs during their service);
11 *Ramirez*, 310 F. Supp. 3d at 21; *Venantius Nkafor Ngwanyia v. Gonzales*, 376 F.
12 Supp. 2d 923, 925 (D. Minn. 2005) (approving settlement in a class action suit
13 involving allegations that federal immigration agencies improperly administered the
14 system by which asylees become lawful permanent residents).

15 Defendants suggest that Section 706(1) relief is not available on a class-wide
16 basis, arguing that “Plaintiffs’ ‘pattern or practice’ allegations are too speculative to
17 otherwise establish a live case or controversy” and, thus, “the Court should dismiss
18 any ‘pattern or practice’ claims under Rule 12(b)(1).” (ECF No. 135-1 at 22, 24.)
19 Central to this argument is Defendants’ contention that “Plaintiffs have not alleged
20 that all CBP officers at [POEs] always deny asylum seekers access to the asylum
21 process.” (*Id.* at 24.) Like Defendants’ misguided attack on the Individual Plaintiffs’
22 Article III standing based on the parties’ agreement about what the INA requires,
23 Defendants’ targeting of the pattern allegations as “too speculative” to establish a
24 “live case or controversy” misses the mark.

25 Defendants readily concede that the Complaint identifies incidents in which
26 asylum seekers who presented themselves at POEs along the U.S.-Mexico border
27 have been denied access to the asylum process. (ECF No. 135-1 at 24.) Even in the
28 absence of Defendants’ concession, the Complaint incorporates numerous reports

1 from non-governmental organizations operating in the U.S.-Mexico border region,
 2 which document hundreds of examples of asylum seekers who CBP officials denied
 3 access to the U.S. asylum process. (Compl. ¶¶ 37–38, 96–102.) While Defendants
 4 may seek to minimize those allegations by selectively casting doubt on the reliability
 5 of those portions of the reports that reflect negatively on CBP and by characterizing
 6 the reports as showing only “an alleged 1.6% denial rate,” (ECF No. 135-1 at 14), the
 7 volume of denials is irrelevant to whether the Complaint concretely alleges that other
 8 individuals have been subjected to the same alleged failures to act by CBP officials.
 9 The Complaint plainly alleges such failures, which the Court is required to take as
 10 true at this stage. Because the Individual Plaintiffs have standing in their own right
 11 to seek Section 706(1) relief to compel the Defendants to inspect and process them
 12 for admission, they may request that relief for a putative class of others asylum
 13 seekers who have allegedly experienced the same failures to act. *See O’Shea v.*
 14 *Littleton*, 414 U.S. 488, 494 (1974). Accordingly, the Court rejects Defendants’
 15 challenge to the Complaint’s practice allegations, which are merely a feature of the
 16 class action nature of this case.

17 **3. The Complaint Fails to State a Section 706(1) Claim for Relief**
 18 **Pursuant to 8 C.F.R. § 235.4**

19 Although the Complaint states Section 706(1) claims regarding the alleged
 20 failures of CBP officials to permit the Individual Plaintiffs to access the U.S. asylum
 21 process, certain Individual Plaintiffs also seek relief regarding alleged coercion by
 22 CBP officials. As the Court has discussed, all Plaintiffs argue that they only press
 23 Section 706(1) claims to compel agency action unlawfully withheld. (ECF No. 143
 24 at 19.) The Court will therefore consider these Plaintiffs’ coercion allegations within
 25 the Section 706(1) framework.

26 Plaintiffs A.D., B.D., and C.D. each allege that on of one of the occasions they
 27 sought asylum, CBP officials coerced them to into signing documents which stated
 28 that they lacked a fear of persecution. (Compl. ¶¶ 42–43, 50–51, 56–58.) A.D. and

1 C.D. further allege that CBP officials forced them to recant their fears in video
 2 recorded statements. (*Id.* ¶¶ 42–43, 56–58.) They further refer to their allegations
 3 regarding CBP’s alleged coercion of certain Individual Plaintiffs in discussing their
 4 Section 706(1) claims. (ECF No. 143 at 20.) Both sides further agree that “the law
 5 requires an alien’s decision to withdraw his or her application for admission be
 6 voluntary” under 8 C.F.R. § 235.4. (ECF No. 135-1 at 20; ECF No. 143 at 20.) That
 7 the parties agree on the text of the INA’s provisions and certain implementing
 8 regulations, however, does not mean that the Court in fact has authority to provide
 9 Section 706(1) relief based on 8 C.F.R. § 235.4. The Court concludes that it does not.

10 The Court has the authority to compel an agency action pursuant to Section
 11 706(1) only when there is “a specific, unequivocal command” placed on the agency
 12 to take a “discrete agency action,” and the agency has failed to take that action.
 13 *SUWA*, 542 U.S. at 63–64. The obligation placed on the agency action must be “so
 14 clearly set forth that it could traditionally have been enforced through a writ of
 15 mandamus.” *Hells Canyon Pres. Council*, 593 F.3d at 932. The action must be a
 16 “precise, definite act.” *Id.* The only provision Plaintiffs cite in the Complaint and
 17 their opposing papers regarding the alleged coercion of withdrawal statements is 8
 18 C.F.R. § 235.4, a regulation which states that “[t]he alien’s decision to withdraw his
 19 or her application [for admission] must be made voluntarily[.]” 8 C.F.R. § 235.4.
 20 This language is an insufficient basis for the Court to grant any Section 706(1) relief
 21 pursuant to the regulation.

22 Although the clear objective of 8 C.F.R. § 235.4 is to ensure that an alien’s
 23 withdrawal of an application for admission is made voluntarily, the regulation’s plain
 24 text “does not instruct [the Defendants] to do anything.” *San Luis Unit Food*
 25 *Producers v. United States*, 709 F.3d 798, 807 (9th Cir. 2013). The regulation does
 26 not require CBP officers to determine whether a withdrawal was made voluntarily,
 27 and it does not specify what CBP officers must do if a withdrawal was not. The
 28 regulation thus “leaves [the agency] a great deal of discretion in deciding how to

1 achieve” its objective and, in turn, lacks “the clarity necessary to support judicial
 2 action under § 706(1).” *SUWA*, 542 U.S. at 66; *see also San Luis Unit Food*
 3 *Producers*, 709 F.3d at 803 (“Statutory goals that are ‘mandatory as to the object to
 4 be achieved; but that leave the agency ‘with discretion in deciding how to achieve’
 5 those goals are insufficient to support a ‘failure to act claim because such
 6 discretionary actions are not ‘demanded by the law.’”).

7 Although Plaintiffs’ allegations may show that there are “[g]eneral deficiencies
 8 in compliance,” *SUWA*, 542 U.S. at 66, there is nothing this Court can permissibly
 9 compel from Defendants pursuant to with 8 C.F.R. § 235.4 to correct those
 10 deficiencies. Accordingly, the Court dismisses Plaintiff A.D., B.D., and C.D.’s
 11 Section 706(1) claims without prejudice *only insofar* as these Plaintiffs seek relief
 12 pursuant to this regulation. This determination does not affect the Court’s conclusion
 13 that these Plaintiffs have otherwise stated Section 706(1) claims regarding their
 14 alleged denial of access to the asylum process in the United States.

15 **4. The Complaint Fails to State a Section 706(2) Claim** 16 **Regarding Defendants’ Alleged Policy**

17 The Complaint alleges that CBP officials have systematically prevented
 18 asylum seekers arriving at POEs along the U.S.-Mexico border from accessing the
 19 U.S. asylum process since summer 2016. (Compl. ¶¶ 1, 5, 37.) Plaintiffs allege that
 20 this conduct has been documented “in hundreds of cases” at POEs along the border.
 21 (*Id.* ¶¶ 37–38.) The bulk of Defendants’ motion to dismiss concerns whether
 22 Plaintiffs have stated a Section 706(2) claim regarding an alleged “policy” of the
 23 Defendants to deny asylum seekers who present themselves at POEs along the U.S.-
 24 Mexico border access to the asylum process. (ECF No. 135-1 at 11–20.) Defendants
 25 argue that “[w]hile the Complaint does not expressly seek judicial review of a final
 26 agency action, it alleges that CBP has adopted an ‘officially sanctioned policy’[.]”
 27 (*Id.* at 11 (citing Compl. ¶¶ 5, 154).) Defendants contend that “to the extent the Court
 28 construes those references as a request for judicial review of an alleged unlawful

1 policy under the APA” pursuant to Section 706(2), the Court should dismiss that
 2 request because: (1) Plaintiffs fail to identify an agency action and, even if Plaintiffs
 3 have done so, (2) the Complaints fails to show a final agency action. (*Id.* at 12.)

4 Plaintiffs assert that “Defendants’ critique is misplaced” because “the review
 5 of ‘final agency action’ . . . under [] § 706(2) is distinct from the analysis for APA
 6 claims to compel agency action under § 706(1), and Plaintiffs brought the latter APA
 7 claim.” (ECF No. 143 at 19.) Normally, the Court would construe Plaintiffs’
 8 response as a concession that they do not press a Section 706(2) claim and would not
 9 address the issue further. However, two points convince the Court that further
 10 analysis warranted. For one, the Complaint expressly invokes Section 706(2) as a
 11 basis for judicial review of Defendants’ alleged conduct. (Compl. ¶¶ 151–164.)
 12 Plaintiffs’ requested injunctive relief in turn includes “prohibiting Defendants . . .
 13 from engaging in the unlawful policies . . . described herein at POEs along the U.S.-
 14 Mexico border.” (*Id.* at 52–53.) Therefore, contrary to Plaintiffs’ assertion, the
 15 Complaint appears to include a Section 706(2) claim. Second, in opposing
 16 Defendants’ motion, Plaintiffs assert that they “have alleged an illegal policy or
 17 practice” because they “have pled sufficient facts . . . to support a reasonable inference
 18 of liability” of the named Defendants. (ECF No. 143 at 21.) Plaintiffs’ assertion is
 19 made *independently* of the APA’s basis for judicial review of agency action.
 20 (*Contrast id.* at 19–20 (arguing that Section 706(1) APA claim is plausible) *with id.*
 21 at 21–23 (arguing that Defendants’ policy is plausible).)

22 The Complaint and Plaintiffs’ assertions raise two issues. First, the Court must
 23 consider whether Plaintiffs may seek review of Defendants’ alleged policy
 24 independently of the APA. The Court concludes that they may not. Second, because
 25 Plaintiffs must seek review of any alleged policy pursuant to Section 706(2), the Court
 26 must consider whether the Plaintiffs have satisfied the APA’s requirements for
 27 judicial review and, specifically, the final agency action requirement. The Court
 28 concludes they have not.

a. Judicial Review of Defendants’ Alleged Policy Must Proceed Under the APA

Plaintiffs assert that Defendants may be held liable for an alleged policy of denying asylum seekers who present themselves at POEs along the U.S.-Mexico border access to the U.S. asylum process. And they make that assertion by relying solely on cases in which courts considered Section 1983 and *Bivens* challenges. Neither Section 1983, nor *Bivens*, however, provides a basis for holding the Defendants liable. Nor does either supply the appropriate legal framework for review of Defendants’ alleged policy. Based on the pleadings, the APA supplies the appropriate framework for judicial review of the alleged policy.

As a general matter, “[t]he APA governs the conduct of federal administrative agencies,” *Aracely, R.*, —F. Supp. 3d—, 2018 WL 3243977, at *5, and it provides a “default judicial review standard” for agency action, *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000). “While a right to judicial review of agency action may be created by a separate statutory or constitutional provision, once created it becomes subject to the judicial review provisions of the APA unless specifically excluded.” *Webster v. Doe*, 486 U.S. 592, 607 n* (1988) (Scalia, J., dissenting); *Ninilchik Traditional Council*, 227 F.3d at 1194 (citing Scalia’s *Webster* dissent approvingly). In this case, the Complaint challenges agency action pursuant to the APA. (Compl. ¶¶ 151–164.) Although the Complaint purports to bring a separate claim for violation of the Plaintiffs’ “procedural due process rights under the Fifth Amendment,” that claim expressly incorporates the alleged APA violations. (*Id.* ¶¶ 166, 171.) Plaintiffs allege that “the INA and its implementing regulations provide Class Plaintiffs the right to be processed at a POE and granted access to the asylum process” and that “CBP officials have denied Class Plaintiffs access to the asylum process and failed to comply with procedures set forth in the INA and its implementing regulations.” (*Id.* ¶¶ 168, 169.) “Insofar as [Plaintiffs] have such an entitlement” under the INA and its implementing regulations, Plaintiffs

1 “may obtain all the relief they request under the provisions of the APA.” *Graham v.*
 2 *Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1001 n.2 (9th Cir. 1998). Obtaining
 3 such relief from Defendants’ alleged policy of course requires Plaintiffs to satisfy the
 4 APA’s judicial review requirements. *See Navajo Nation*, 876 F.3d at 1171 (“§ 704’s
 5 requirement that to proceed under the APA, agency action must be final or otherwise
 6 reviewable by statute is an independent element without which court may not
 7 determine APA claims.”). Plaintiffs’ reliance on Section 1983 and *Bivens* case law
 8 does not convince the Court otherwise.

9 Liability under Section 1983 is inapt in this case. The Complaint does not
 10 invoke Section 1983 as a basis for holding the named Defendants liable. Even if it
 11 did, liability would not lie against the Defendants. Defendants Nielsen, McAleenan,
 12 and Owen are Federal Executive officers or officials sued in their official capacity for
 13 their duties pursuant to federal law. (Compl. ¶¶ 25–27.) As Defendants recognize
 14 (ECF No. 145 at 9–10), Section 1983’s plain terms do not provide a cause of action
 15 against federal officers acting in their official capacity. *See* 42 U.S.C. § 1983; *see*
 16 *also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017) (“[Section 1983] entitles an
 17 injured person to money damages if a state official violates his or her constitutional
 18 rights. Congress did not create an analogous statute for federal officials.”); *Pangacos*
 19 *v. Towery*, 782 F. Supp. 2d 1983, 1189 (W.D. Wash. 2011) (“Federal officers are
 20 exempt from the proscription of § 1983) (citing *District of Columbia v. Carter*, 409
 21 U.S. 418, 424–25 (1973); *McCloskey v. Mueller*, 446 F.3d 262, 271 (1st Cir. 2006));
 22 *Comm. for Immigrant Rights v. Cty. of Sonoma*, 644 F. Supp. 2d 1177, 1203 (N.D.
 23 Cal. 2009) (“Federal officers acting under federal authority are immune from suit
 24 under § 1983 unless the state or its agents significantly participated in the challenged
 25 activity). Plaintiffs’ reliance on Section 1983 to assert that the Defendants may be
 26 held liable is thus inappropriate. *See Morse v. North Coast Opportunities, Inc.*, 118
 27 F.3d 1338, 1343 (9th Cir. 1997) (“Lest there be any continuing confusion, we take
 28 this opportunity to remind the Bar that by its very terms, § 1983 precludes liability in

1 federal government actors.”).

2 Taking for granted that Section 1983 does not apply to federal officers,
3 Plaintiffs further assert that their “allegations of a policy or practice are analogous to
4 claims brought under *Monell*[.]” (ECF No. 143 at 21 n.7.) *Monell* permits a Section
5 1983 plaintiff to establish municipal liability for an alleged constitutional violation in
6 certain circumstances, including by showing that a municipal employee committed
7 an alleged constitutional violation pursuant to a formal government policy or a
8 longstanding practice or custom which constitutes the standard operating procedure
9 of the local governmental entity. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701,
10 737(1989); *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992). To the extent
11 Plaintiffs are arguing that an alleged policy is subject to judicial review because their
12 allegations could establish *Monell* liability, the Court rejects this argument. *Monell*
13 arose in the context of a statute that is fundamentally different from the APA. Most
14 relevant here are two limitations: (1) whereas the APA is limited to “agency action,”
15 Section 1983 reaches the conduct of “[e]very person” alleged to have violated federal
16 law, and (2) whereas the APA permits judicial review of only a “final agency action”
17 unless another statute makes the action reviewable, Section 1983 contains no identical
18 or analogous limitation on review. *Contrast* 5 U.S.C. §§ 702, 704 *with* 42 U.S.C. §
19 1983. Given these key differences, analogizing to Section 1983 liability is not
20 helpful.

21 The remaining cases cited by both parties involve *Bivens* actions against federal
22 officers sued in their individual capacity for alleged constitutional violations. (ECF
23 No. 135-1 at 11, 17; ECF No. 143 at 23.) In *Bivens*, the Supreme Court fashioned a
24 judicial cause of action for damages to redress constitutional violations committed by
25 a federal officer by treating such an action as one against the officer in his or her
26 individual capacity and thus not barred by sovereign immunity. *Bivens*, 403 U.S. 388,
27 409–10 (1971) (Harlan, J, concurring). By its nature, a *Bivens* suit is limited to
28 *damages* claims against a federal officer in his or her *individual capacity*. *See*

1 *Ministerio Roca Solida*, 820 F.3d at 1093–94; *see also Consejo de Desarrollo*
 2 *Economico de Mexicali, A.C.*, 482 F.3d at 1173; *Vaccaro v. Dobre*, 81 F.3d 854, 857
 3 (9th Cir. 1996) (a *Bivens* action “can be maintained against a defendant in his or her
 4 individual action only, and not in his or her official capacity.”). A *Bivens* action “does
 5 not encompass injunctive and declaratory relief where . . . the equitable relief requires
 6 official government action.” *Ministerio Roca Solida*, 820 F.3d at 1093–94; *Consejo*
 7 *de Desarrollo Economico de Mexicali, A.C.*, 482 F.3d at 1173. In such cases, “*Bivens*
 8 is both inappropriate and unnecessary” in large part “because the Administrative
 9 Procedure Act waives sovereign immunity for such claims” and thus provides a
 10 mechanism for judicial review. *Ministerio Roca Solida*, 820 F.3d at 1095, 1096.

11 Much of the dispute between the parties regarding Plaintiffs’ policy allegations
 12 concerns whether Defendants may be held liable for the alleged conduct of some CBP
 13 officials along the U.S.-Mexico border, liability which requires some connection
 14 between the conduct of those officials and the named Defendants in this case.
 15 (*Compare* ECF No. 135-1 at 11, 17 *with* ECF No. 143 at 23.)¹⁴ This dispute
 16 overlooks a key point: the *Bivens* framework for holding federal government officials
 17 liable for alleged constitutional violations has no application in this case. This case is
 18 far from a *Bivens* action in form and substance. The Complaint names the Defendants
 19 in their official capacity and seeks declaratory and injunctive relief that undoubtedly
 20 requires official government action. Thus, *Bivens* liability is not appropriate.

22 ¹⁴ For example, Defendants rely on *Perez v. United States*, 103 F. Supp. 3d
 23 1180, 1200 (S.D. Cal. 2015), to argue that Plaintiffs have failed to allege “any factual
 24 connection between the alleged misconduct of a handful of officers and a policy” of
 25 the named Defendants and thus cannot show a “broadly sanctioned policy.” (ECF
 26 No. 135-1 at 11, 17.) In contrast, Plaintiffs argue that the Complaint demonstrates an
 27 alleged “high-level knowledge and acquiescence in the unlawful conduct,” of CBP
 28 officials by the named Defendants for which the latter may be held liable. (ECF No.
 143 at 23.) The assumption underlying each of these arguments is that *Bivens*
 supervisory liability for the allegedly unconstitutional conduct of low-level officers is
 applicable in this case. It is not.

1 With neither Section 1983, nor *Bivens* providing a framework applicable to
 2 Defendants' alleged policy, the Court affirms that the APA supplies the relevant
 3 framework for considering Defendants' alleged policy. *See Am. Fin. Benefits Ctr. v.*
 4 *Fed. Trade Comm'n*, No. 17-04817, 2018 WL 3203391, at *5 (N.D. Cal. May 29,
 5 2018) (analyzing plaintiffs' claims under the APA because "although Plaintiffs assert
 6 that the APA is inapplicable, they fail to identify any other basis for judicial review
 7 or the exercise of this Court's jurisdiction").

8 **b. The Complaint Does Not Identify a Final Agency Policy**

9 The APA limits judicial review to agency action in the form of "the whole or
 10 part of an agency rule, order, license, sanction, relief, or the equivalent or denial
 11 thereof, or failure to act." 5 U.S.C. § 551(13). An agency action must be "reviewable
 12 by statute or a "final agency action for which there is no other adequate remedy[.]" 5
 13 U.S.C. § 704. Two conditions must be satisfied for an agency action to be final: (1)
 14 "the action must mark the consummation of the agency's decisionmaking process—
 15 it must not be of a merely tentative or interlocutory nature" and (2) "the action must
 16 be one by which rights or obligations have been determined, or from which legal
 17 consequences will flow." *United States Army Corps of Engineers v. Hawkes Co.*, 136
 18 S. Ct. 1807, 1813 (2016) (quoting *Bennett*, 520 U.S. at 177–78). Although the finality
 19 requirement is "flexible" and must be applied in a "pragmatic way," it is nevertheless
 20 a requirement that a plaintiff seeking review of agency action must satisfy.¹⁵ *See*
 21

22 ¹⁵ The Ninth Circuit has previously referred to the final agency action
 23 requirement as a jurisdictional requirement. *See City of San Diego v. Whitman*, 242
 24 F.3d 1097, 1102 (9th Cir. 2001). However, this view of the final agency requirement,
 25 as applicable to courts in the Ninth Circuit, has been questioned. *See Pebble Ltd.*
 26 *P'ship v. United States EPA*, 604 Fed. App'x 623, 625–26 (9th Cir. 2015) (Watford,
 27 J., concurring) ("[I]n my view the D.C. Circuit has persuasively explained why our
 28 court's precedent on this point is wrong. As that court held in *Trudeau v. FTC*, 456
 F.3d 178 (D.C. Cir. 2006), § 704 is not a jurisdiction-conferring statute."). The
Navajo Nation panel at least suggested that Section 704's finality requirement should
 not be viewed as jurisdictional. *See Navajo Nation*, 876 F.3d at 1171 ("[Section]

1 *Oregon Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006).

2 The Complaint contains a single allegation that Defendants have an “officially
3 sanctioned policy” of denying asylum seekers who present themselves at POEs along
4 the U.S.-Mexico border access to the U.S. asylum process. (Comp. ¶ 5.) The only
5 formulation of the alleged policy suggested by Plaintiffs is that CBP officials have a
6 categorical policy of denying asylum seekers who present themselves at POEs along
7 the U.S.-Mexico border access to the U.S. asylum system. (*Id.* ¶¶ 1–6.) A further
8 variant of this policy is one in which CBP officials deny access through tactics of
9 misrepresentations, harassment, coercion, threats, and physical violence. (*Id.* ¶¶ 95–
10 101, ECF No. 143 at 23.) But the Court cannot locate a single agency action reflecting
11 Defendants’ alleged policy, let alone one that is final.

12 Neither the Complaint, nor Plaintiffs’ opposition to the motion to dismiss
13 “refer[s] to a single . . . order or regulation” of the Defendants’ which constitutes or
14 reflects an agency policy applicable to all CBP officials at POEs along the U.S.-
15 Mexico border for the challenged conduct. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S.
16 871, 890 (1990) (rejecting plaintiffs’ challenge to the Bureau of Land Management’s
17 alleged “land withdrawal program” because there was no agency action on which to
18 base their challenge under the APA); *ONRC Action v. BLM*, 150 F.3d 1132, 1136 (9th
19 Cir. 1998) (rejecting APA claims because “this case presents a situation where there
20 is no identifiable agency order, regulation, policy or plan that may be subject to
21 challenge as a final agency action”).

22 Plaintiffs observe in opposition that a policy need not be in written form to
23 exist, thus suggesting that the Court should infer the existence of a policy even if the
24 Court cannot locate one reduced to writing. (ECF No. 143 at 21.) The Court readily
25 acknowledges that “agency action . . . need not be in writing to be final and judicially
26

27 704’s requirement that to proceed under the APA, agency action must be final or
28 otherwise reviewable by statute is an *independent element* without which courts may
not determine APA claims.”).

reviewable” pursuant to the APA. *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015). An unwritten policy can still satisfy the APA’s pragmatic final agency action requirement. *See Venetian Casino Resort LLC v. EEOC*, 530 F.3d 925, 929 (D.C. Cir. 2008) (reviewing challenge to an agency’s “decision . . . to adopt [an unwritten] policy of disclosing confidential information without notice” because such a policy was “surely a consummation of the agency’s decisionmaking process” that impacted the plaintiff’s rights); *R.I.L.-R*, 80 F. Supp. 3d at 174–176 (determining that plaintiffs had shown a reviewable unwritten “DHS policy direct[ing] ICE officers to consider deterrence of mass migration as a factor in their custody determinations” as underlying the plaintiffs’ detention). “[A] contrary rule ‘would allow an agency to shield its decisions from judicial review simply by refusing to put those decisions in writing.’” *R.I.L.-R*, 80 F. Supp. at 184 (quoting *Grand Canyon Tr. v. Pub. Serv. Co. of N.M.*, 283 F. Supp. 2d 1249, 1252 (D.N.M. 2003)); *see also Aracely R.*, —F. Supp. 3d—, 2018 WL 3243977, at *16 (“Despite Defendants’ assertions to the contrary, agency action need not be in writing to be judicially reviewable as a final action.”).

Recent cases provide examples of challengeable unwritten agency policies in the immigration context. For example, in *R.I.L.-R*, the plaintiffs challenged two variants of an alleged DHS detention policy affecting Central American mothers accompanied by minor children. In sustaining the “narrower formulation of the relevant policy,” the court rejected the government’s APA finality argument that the plaintiffs had failed to identify a regulation, policy memoranda, or any other document memorializing the challenged policy. *R.I.L.-R*, 80 F. Supp. 3d at 174. The court determined that the plaintiffs had shown the existence of a “DHS policy direct[ing] ICE officers to consider deterrence of mass migration as a factor in their custody determinations” through firsthand knowledge and data showing that “ICE has been largely denying release to Central American mothers accompanied by minor children since June 2014.” *Id.* These denials were “contrary to past practice” of DHS and, while claiming there was no policy document, Defendants had “essentially

1 conceded that the recent surge in detention during a period of mass migration . . .
 2 reflects a design to deter such migration.” *Id.* at 175. The plaintiffs in *Aracely, R. v.*
 3 *Nielsen* challenged prolonged detention of asylum seekers who present themselves at
 4 POEs. They alleged a “de facto immigration policy promulgated by high-level
 5 officials in Washington D.C.,” which began in 2014 and was “re-emphasized . . . after
 6 the 2016 Presidential election.” *Aracely, R.*, —F. Supp. 3d—, 2018 WL 3243977, at
 7 *4. The alleged policy was “designed to serve as a deterrent to asylum seekers” by
 8 “ordering local officials to heavily weight immigration deterrence in deciding parole
 9 and similar forms of release.” *Id.* The plaintiffs pointed to data showing that the
 10 parole release rate of the asylum seekers who crossed a U.S. POE was 80% in 2012,
 11 but dropped to 47% in 2015. *Id.* The *Aracely* court found this sufficient to show a
 12 final agency policy subject to APA review. *Id.* at *16.

13 To assess whether the Complaint shows an unwritten policy, the Court turns to
 14 the Complaint’s pattern allegations. Plaintiffs rely on those allegations to defend the
 15 existence of an alleged policy and argue that they “have pled sufficient facts to show
 16 a widespread pattern or practice of denial of access to the asylum process[.]” (ECF
 17 No. 143 at 21.) The Court, however, is not convinced that the Complaint’s disparate
 18 “examples”—in Plaintiffs’ words—of conduct by CBP officials supports the
 19 inference that there is an overarching policy. *See Pearl River Union Free Sch. Dist.*
 20 *v. King*, 214 F. Supp. 3d 241 (S.D.N.Y. 2016) (“[T]his is not a case where a policy of
 21 some kind was plainly adopted and illuminated, albeit imperfectly . . . rather, at best,
 22 Plaintiff has alleged that Defendants took certain action with respect to it and asks the
 23 Court to surmise therefrom the existence of a broader policy.”); *Bark v. U.S. Forest*
 24 *Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014) (“Plaintiffs appear to have attached a
 25 ‘policy’ label to their own amorphous description of the [defendant government
 26 agency’s] practices. But a final agency action requires more.”).

27 Unlike the unwritten policies challenged in *R.I.L.-R* and *Aracely*, the Complaint
 28 does not plausibly show the existence of the unwritten policy the Plaintiffs ask this

1 Court to infer. As an initial matter, while the Complaint contains allegations about
 2 the tactics employed by various CBP officials (Compl. ¶¶ 83–103), there are no
 3 allegations connecting any of that conduct with an unwritten policy created by the
 4 Defendants. In fact, Plaintiffs do not even allege that the Defendants were involved
 5 in the development of any policy in this case. *Aracely, R.*, —F. Supp. 3d—, 2018
 6 WL 3243977, at *4. The Complaint’s pattern allegations also fail to show a
 7 categorical unwritten policy of the type Plaintiffs suggest. Even accepting the
 8 Complaint’s references to documented instances of asylum seekers at POEs along the
 9 U.S.-Mexico border who were denied access to the asylum process, the Complaint
 10 expressly incorporates reports which show that many more asylum seekers were not
 11 denied access.¹⁶ For example, the Complaint cites a 2017 report from Human Rights
 12 First, which reports at least 125 occasions between December 2016 and March 2017
 13 in which applicants for admission were denied access. (Compl. ¶ 38 n.27.)¹⁷ Yet, the
 14 report also states that “CBP agents referred some 8,000 asylum seekers at [POEs]”
 15 along the U.S.-Mexico border to credible fear interviews during the same period. *See*
 16 *Crossing the Line*, at 1. This information defeats the inference that a categorical
 17 policy of the nature Plaintiffs intimate exists. *See R.I.L.-R*, 80 F. Supp. 3d at 174
 18 (declining to find that “DHS adopted a categorical policy in June 2014 of denying
 19

20 ¹⁶ Plaintiffs contend that “evidentiary arguments” regarding the existence of the
 21 unwritten policy they allege are not appropriate at the pleading stage. (ECF No. 143
 22 at 23 n.8.) Because the Complaint expressly incorporates various reports and articles
 23 and provides the web links to them, the Court may consider these materials in full to
 24 assess the sufficiency of the allegations in the Complaint. *See Knievel v. ESPN*, 393
 25 F.3d 1068, 1076 (9th Cir. 2005) (courts may also consider “documents ‘whose
 contents are alleged in a complaint and whose authenticity no party questions, but
 which are not physically attached to the [plaintiff’s] pleading.’”).

26 ¹⁷ The Complaint provides the following source: B. Shaw Drake, *et al.*,
 27 *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers*, Human Rights
 28 First, 16 (2017), <https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf> [“*Crossing the Line*”].

1 release to all asylum-seeking Central American families in order to deter further
2 immigration” given that “in some small number of cases” ICE granted bonds).

3 Both sides also dispute whether the Complaint shows the existence of an
4 unwritten policy based on the following allegation: “[o]n June 13, 2017, in
5 questioning before the House Appropriations Committee, the Executive Assistant
6 Commissioner for CBP’s OFO admitted that CBP officials were turning away asylum
7 applicants at POEs along the U.S.-Mexico border.” (Compl. ¶ 103.) However, the
8 Complaint does not incorporate any particular portion of the testimony of John
9 Wagner, Deputy Executive Assistant Commissioner for the Office of Field
10 Operations of CBP, and thus it is not clear that this information is properly reviewable
11 at the motion to dismiss stage. Even if it were, the Court does not find the testimony
12 sufficient to show the existence of the unwritten policy Plaintiffs allege. Insofar as
13 CBP is “working with Mexico to develop methods to control the flow of migrants
14 entering U.S. [POEs] at any given time” (ECF No. 135-1 at 16), that information does
15 not show the consummation of an agency decision-making process, let alone one that
16 applies to asylum seekers in the manner Plaintiffs allege. As for the “contingency
17 plans” for a future “surge of migrants,” (*id.*), it is unclear how a such a plan has any
18 application in this case because the Complaint does not allege that any Plaintiff was
19 turned away by CBP officials as part of a policy concerning migrant “surges.”

20 In the absence of allegations showing a final agency order, rule, regulation,
21 policy, or plan to deny asylum seekers who present themselves at POEs along the
22 U.S.-Mexico border—or allegations from which the Court could infer that one
23 exists—the Complaint fails to plead that Defendants have a policy this Court can
24 “hold unlawful and set aside.” 5 U.S.C. § 706(2). Because Plaintiffs may be able to
25 allege the existence of a policy, the Court dismisses without prejudice Plaintiffs’
26 Section 706(2) claim concerning an alleged policy. This conclusion does not affect
27 the sufficiency of Plaintiffs’ Section 706(1) claims. *See Bark v. U.S. Forest Serv.*, 37
28 F. Supp. 3d 41, 50–51 (D.D.C. 2014) (rejecting challenge to “a generalized, unwritten

1 administrative ‘policy,’” but permitting challenge to five challenged permits).

2 **IV. CONCLUSION & ORDER**

3 For the foregoing reasons, the Court **HEREBY ORDERS** that:

4 1. The Court **GRANTS IN PART** Defendants’ motion to dismiss and
5 **DISMISSES WITHOUT PREJUDICE**: (a) Plaintiffs A.D, B.D., and C.D.’s claims
6 under Section 706(1) only insofar as they have sought to compel agency action under
7 8 C.F.R § 235.4, and (b) all Plaintiffs’ claims under Section 706(2) regarding
8 Defendants’ alleged policy.

9 2. The Court **DENIES ON ALL OTHER GROUNDS** Defendants’
10 motion.

11 3. The Court Plaintiffs **GRANTS LEAVE TO AMEND** the pleadings
12 consistent with this Order. Plaintiffs may file a First Amended Complaint **no later**
13 **than September 15, 2018.**

14 4. If Plaintiffs do not file an amended complaint or request additional time
15 to do so by the foregoing date, Defendants shall file an Answer **no later than**
16 **September 24, 2018.**

17 **IT IS SO ORDERED.**

18 **DATED: August 20, 2018**


Hon. Cynthia Bashant
United States District Judge